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No. 04-

In the Supreme Court of the United States

NORFOLK DREDGING COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA AND BEAN STUYVESANT, L.L.C.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For both homeland and economic security reasons, federal law has long required that domestic waterborne commerce be controlled by U.S. citizens. In 1992, Congress furthered this policy by enacting the Oceans Act of 1992, which provides that dredges operating in U.S. waters may be chartered only to U.S. citizens. Congress also provided grandfather protection for one foreign-owned dredging company that, at the time of enactment, chartered a single dredging vessel, of the type known as a "hopper dredge." In this case, the Federal Circuit held that the Oceans Act's grandfather provision allows that foreign entity to make essentially unlimited use of significantly different and much more numerous types of "non-hopper dredges." The Federal Circuit disregarded arguments that its holding frustrates the clear congressional intent and poses a grave threat to the U.S. dredging industry. The question presented is:

Whether the Federal Circuit erred by disregarding the statutory context and purpose in holding that the Ocean Act's grandfather provision, 46 U.S.C. App. § 292 note, does not limit use of non-hopper dredges in U.S. waters by non-citizens to circumstances where those vessels will supplement or temporarily replace work performed by hopper dredges.

RULE 29.6 STATEMENT

Petitioner, Norfolk Dredging Company, Inc., states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Norfolk Dredging Company, Inc. ("Norfolk"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit's opinion (App., *infra*, 1a-11a) is reported at 375 F.3d 1106 (2004). The opinion of the Court of Federal Claims (App., *infra*, 12a-50a) is reported at 58 Fed. Cl. 741 (2003).

JURISDICTION

The Federal Circuit issued its decision on July 7, 2004. App., *infra*, 1a. Petitioner's timely filed petition for rehearing *en banc* was denied on August 13, 2004. App., *infra*, 51a. Chief Justice Rehnquist extended the time for filing a petition for writ of certiorari until December 11, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the Appendix. App., *infra*, 52a.

STATEMENT

This case presents an important question about the meaning of a federal statute that was enacted to assure the survival and competitive health of the United States dredging industry. To further the longstanding federal policy that precludes foreign interests from participating in domestic maritime commerce, Congress generally barred non-citizens from chartering dredges for use in U.S. waters. In this case, however, the Federal Circuit interpreted that statute's narrow grandfather provision as permitting a favored foreign-owned company (as well as *any* entity in which that company has *any* ownership interest) to operate virtually without limit in

the U.S. dredging market. That decision undermines the clear congressional purpose, poses a significant threat to U.S. maritime capability, and disregards this Court's unequivocal guidance on the proper approach to statutory interpretation. Further review accordingly is warranted.

1. The domestic dredging industry performs a vital function by maintaining and improving U.S. ports and channels of navigation. The private sector dredging fleet moves 85 percent of the approximately 250 million cubic yards of material that is dredged each year in coastal and inland harbors and channels at the direction of the U.S. Army Corps of Engineers. See Joint Hearing On Interpretations of Existing Ownership Requirements for U.S. Flag Dredges of Subcomm. On Water Resources and Environment and Subcomm. On Coast Guard and Maritime Transportation, April 30, 2003 ("2003 Joint Hearing") (statement of Barry W. Holliday, Army Corps of Engineers) (available at http://www.house.gov/transportation/water/04-30-03/holliday.html). All new construction dredging work in those waters is performed by the dredging industry, which has annual revenues that approach $1 billion.[1]

Insofar as is relevant here, the dredging industry makes use of two very different sorts of vessels that constitute distinct segments of the dredging market. So-called "hopper" dredges are large, self-propelled ocean-going vessels that store and transport dredged material. They are able to dredge

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[1] According to one estimate, the Corps of Engineers manages about $900 million in dredging contracts each year, a figure that does not include contracts let directly by state and local port authorities. See Mem. of 2003 Joint Hearing (available at http://www.house.gov/transportation/water/04-30-03/04-30-03memo.html). A representative of the Army Corps of Engineers gave a slightly lower figure, $600 to 700 million per year. 2003 Joint Hearing (Statement of Barry W. Holliday) (available at http://www.house.gov/transportation/water/04-30-03/holliday.html).

against strong currents and to operate in rough, open seas. "Non-hopper dredges," in contrast, usually consist of excavation machinery that is mounted on non-self propelled barges. Non-hopper dredges, which are unable to store or transport dredged material, are smaller than hopper dredges and may work in waterways that are inaccessible to hopper dredges. See U.S. Army Corps of Engineers, *Engineer Manual 1110-2-5025: Dredging and Dredged Material Dispersal*, at 3-3 through 3-25 (March 25, 1983) (available at http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-5025/entire.pdf). Non-hopper dredges are much more numerous than hopper dredges; in 2003, the U.S. dredge fleet consisted of 608 vessels, of which only 18 were hopper dredges. 37TH ANNUAL DIRECTORY OF WORLDWIDE DREDGE FLEETS (WORLD DREDGING MINING & CONSTRUCTION; March 2003). In fiscal years 2002 and 2003, the Corps of Engineers issued 245 non-hopper contracts totaling almost $1.2 billion. It issued 80 contracts involving the use of hopper dredges totaling $293 million. Navigation Data Center of the U.S. Army Corps of Engineers (available at http://www.iwr.usace.army.mil/ndc/dredge/drgtype.htm).

2. Throughout this nation's history, Congress has passed numerous "cabotage laws" to preclude foreign interests from participating in the domestic maritime industry. The fundamental purpose of these laws is "to assure reliable domestic shipping service and the existence of a maritime capability that is completely subject to national control in times of war and national emergency." U.S. Dept. of Transportation, Maritime Administration, *By the Capes—A Primer on U.S. Coastwise Laws* (available at http://www.marad.dot.gov/publications/primer_laws.html).

At the turn of the 20th century, the participation of foreign-built dredges in the U.S. domestic dredging industry fell into disfavor, as it was perceived to violate the spirit and intent of the U.S. cabotage laws. Congress responded by enacting the Foreign Dredge Act of 1906, 34 Stat. 204, which

provided that "[a] foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States."

More severe restrictions, addressed to domestic maritime commerce in general, followed. In 1920, Congress enacted the Merchant Marine Act, which, in Section 27 (popularly known as the Jones Act), provides that merchandise transported entirely or partly by water between points in the U.S. must travel in U.S. citizen-*owned* vessels that have been documented by the U.S. government. 41 Stat. 999, 46 U.S.C. App. § 883. For purposes of this provision, at least seventy-five percent of a corporation, partnership, or association must be owned by U.S. citizens for the entity to be deemed a citizen. 46 U.S.C. App. § 802.

These restrictions proved inadequate as applied to the dredging industry, however. For one thing, they did not apply to non-hopper dredges, which do not transport "merchandise," but instead pipe the dredged material to a separate location as it is dredged.[2] For another, even in the case of hopper dredges, the Jones Act does not proscribe arrangements whereby non-U.S. citizens gain effective control of a vessel used in domestic waters through the long-term charter of the vessel from a U.S. citizen that nominally owned it. That was the case with the hopper dredge *Stuyvesant*, which was constructed in 1982. Although owned by a U.S. citizen, the *Stuyvesant* was contracted under a long-term charter to a Dutch firm, the Stuyvesant Dredging Company ("SDC"), which is the wholly owned subsidiary of another Dutch firm, Royal Boskalis Westminster, NV ("Boskalis"). 2003 Joint Hearing (statement of Richard S. Weeks, Dredging Contractors of America) (available at http://www.house.gov/trans-

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[2] Hopper dredges, by contrast, store the dredged material on board for later disposal and are generally considered to transport "merchandise" within the meaning of the Jones Act.

portation/water/04-30-03/weeks.html). Boskalis is the largest dredging company in the world and conducts 35 percent of the world's dredging operations. See Mem. of 2003 Joint Hearing (available at http://www.house.gov/transportation/water/04-30-03/04-30-03memo.html). Through this "elaborate ownership and chartering arrangement," non-citizens SDC and Boskalis were able to perform dredging operations in U.S. waters using the *Stuyvesant*. 2003 Joint Hearing (statement of Richard S. Weeks, Dredging Contractors of America) (available at http://www.house.gov/transportation/water/04-30-03/weeks.html).

3. In 1992, as a specific response to the operation of the *Stuyvesant* in domestic waterways, Congress turned its attention to closing this "loophole[]." 138 Cong. Rec. H5006-02, H5017 (June 22, 1992) (remarks of Rep. Tauzin). To accomplish this purpose, and to "make all domestically operated dredges subject to the same documentation and ownership requirements as other vessels under the coastwise trade laws" (*ibid.*), Congress enacted the Oceans Act of 1992, Pub. L. No. 102-587, 106 Stat. 5039. That statute amends the Foreign Dredge Act of 1906 to provide, in relevant part:

> * * * [A] vessel may engage in dredging in the navigable waters of the United States only if—
>
> * * *
>
> (2) *when chartered, the charterer of the vessel is a citizen of the United States under sections 802 and 803 of this title for engaging in the coastwise trade*[.[3]]

46 U.S.C. App. § 292 (emphasis added)

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[3] Coast Guard regulations define "[c]oastwise trade [to] includ[e] the transportation of passengers or merchandise between points embraced within the United States." 46 C.F.R. § 67.3.

In the provision of the law directly at issue in this litigation, the Oceans Act also included a "grandfathe[r] [clause for] existing" fleets (138 Cong. Rec. H5006-02, H5018 (remarks of Rep. Tauzin)) – most notably, for the hopper dredge *Stuyvesant*. The grandfather exception provides that the requirement that the chartering entity be a U.S. citizen "does not apply to":

> (A)(i) the vessel STUYVESANT, official number 648540;
>
> (ii) any other hopper dredging vessel documented under chapter 121 of title 46, United States Code before the effective date of this Act and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest; however, this exception expires on December 3, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs; and
>
> (iii) any other non-hopper dredging vessel documented under chapter 121 and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest, as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs[.]
>
> * * *

46 U.S.C. App. § 292 note (2).[4]

3. On August 8, 2003, the U.S. Army Corps of Engineers solicited bids for a dredging project in Morehead City Inner Harbor, North Carolina. The solicitation prohibited the use of hopper dredges to perform the work. The low bidder was respondent Bean Stuyvesant, L.L.C. ("Bean Stuyvesant"); Bean Stuyvesant proposed to use the non-hopper dredge *Meridian*, which Bean Stuyvesant would charter from the *Meridian*'s U.S. owner, to perform the work. Bean Stuyvesant is 50% owned by Bean Dredging, L.L.C., a U.S. company, and 50% owned by SDC, the entity that is wholly owned by the Dutch corporation Boskalis. Thus, lacking at least 75% U.S. ownership, Bean Stuyvesant does not qualify as a U.S. citizen under 46 U.S.C. App. § 802, and it is precluded from chartering the *Meridian* – unless the Oceans Act's grandfather provision applies. App., *infra*, 2a-3a, 15a.

Petitioner, Norfolk, was the second lowest bidder. Norfolk is owned entirely by U.S. citizens and therefore is a U.S.

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[4] The grandfather provision also protects certain other specifically identified vessels or types of vessels: "the vessel COLUMBUS" (46 U.S.C. App. § 292 note (2)(B)); "a vessel that is engaged in dredged material excavation if that excavation is not more than a minority of the total cost of the construction contract" (46 U.S.C. App. § 292 note (2)(C)); and "any other documented vessel engaged in dredging and time chartered to an entity that, on August 1, 1989, was, and has continuously remained, the parent of a corporation that had on file with the Secretary of Transportation on August 1, 1989, a certificate specified in section 27A of the Merchant Marine Act, 1920 (46 App. U.S.C. 883-1)," and that was engaged in specified, limited dredging activities. 46 U.S.C. App. § 292 note (2)(D). The *Columbus* is a hopper dredge that had at one time been documented under a foreign flag and therefore had lost its entitlement to transport material between points in U.S. waters. The other vessels benefited by these provisions were used by a non-citizen construction company that had dredging operations incidental to its construction business.

citizen under 46 U.S.C. App. § 802. Norfolk accordingly filed an expedited bid protest action against the United States in the Court of Federal Claims, arguing that Bean Stuyvesant is ineligible to perform the Morehead City contract because it is not a U.S. citizen and the vessel *Meridian* does not come within the grandfather exception. Bean Stuyvesant intervened in support of the United States, arguing that the grandfather clause permits any company in which SDC has an ownership interest to charter any non-hopper dredge that is used to fulfill a dredging contract. App., *infra*, 2a.

4. On cross-motions for summary judgment, the Court of Federal Claims ruled in favor of Norfolk. App., *infra*, 12a, 45a-46a. The court found the grandfather exception "amenable to a construction based on its plain meaning" (*id.* at 34a), and held that, under this construction, the *Meridian* did not come within the grandfather exception. The court began by observing that "[t]he exception contains four exemptions from the prohibition [on foreign ownership or control]. * * * Each of these is a limited exception directed to a vessel, not a company." *Ibid.* (citing 46 U.S.C. App. § 292 note (2)(A)-(D)). The court then turned to the specific exemption at issue, that concerning the vessel *Stuyvesant*:

> With respect to the vessel STUYVESANT, the exception applies to three types of vessels: the STUYVESANT itself, other hopper vessels, and non-hopper vessels. All three types of dredging vessels must be documented as required. The hopper and non-hopper vessels must be chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest. The exception is delimited further in that it is finite: The exception expires at the earlier of 30 years or when the vessel STUYVESANT ceases to be documented.
>
> * * *

> With respect to non-hopper vessels, like the vessel MERIDIAN, Congress further delimited the exception to the 1992 amendment. The exception to non-hopper vessels only applies in two circumstances. The activities of the dredge must be deemed necessary to fulfill dredging obligations under a specific contract, including any extension periods; or, alternatively, the dredge must be serving in a temporary replacement capacity for a vessel that has become disabled. * * *
>
> These provisions must be construed together and complement each other harmoniously. * * * Under subsection (A)(iii), Stuyvesant Dredging Company or an entity in which it has an interest can utilize any non-hopper, even if not yet built, *to fulfill contracts entered into using STUYVESANT or any other qualified hopper. In other words, the non-hoppers would be supplemental to the dredging activities involving hoppers.*

App., *infra*, 34a-35a (emphasis added).

Applying this interpretation to the facts, the court held that the non-hopper dredge *Meridian* does not qualify under the grandfather exception because it was not chartered to *supplement* or *temporarily replace* the *Stuyvesant* or another qualified hopper, but rather was chartered to perform the entire contract. *Id.* at 40a.

The court pointed out that the interpretation of the grandfather exception proffered by the United States and Bean Stuyvesant – which would allow any foreign-owned entity in which SDC has an interest to charter any non-hopper dredge for any contractual purpose – was so broad as to "swallow" the rule. App., *infra*, 46a. Under that interpretation, "foreign entities could charter non-hoppers not yet documented for any dredging for the next 30 years. The exception would disappear because it would allow for unlimited expansion by

Stuyvesant Dredging Company into the non-hopper dredging business." *Ibid.*

Finally, the court found that its analysis was corroborated by the legislative history. The clear purpose of the Oceans Act, as described by its principal proponent, was to "'clos[e] loopholes * * * [while] grandfather[ing] *existing*'" fleets. App., *infra*, 42a (quoting 138 Cong. Rec. H5006-02, H 5017 to H 5018 (remarks of Rep. Tauzin)) (emphasis in original). Thus, the legislative history underscores that a key prerequisite to qualifying as a non-hopper vessel under subparagraph (A)(iii) of the grandfather exception is that the non-hopper be used to supplement (or temporarily replace) either the *Stuyvesant* or another hopper in existence and documented as of 1992.

4. The Federal Circuit reversed. App., *infra*, 1a. In contrast to the Court of Federal Claims' approach of reading the clauses and subparagraphs of the grandfather provision as related and in context, the Federal Circuit held that each clause of the grandfather's subparagraph (A) must be viewed in isolation because "[t]hese three self-contained, semi-colon delimited subparagraphs are independent of each other." *Id.* at 7a.

The Federal Circuit's focus on subparagraph (A)(iii) led the court to announce four prerequisites, drawn exclusively from that subparagraph, for a non-hopper vessel to qualify under the grandfather exception:

> (1) the non-hopper dredge must be documented under 46 U.S.C. ch. 121; (2) the non-hopper dredge must be 'chartered to [SDC] or to an entity in which it has an ownership interest'; (3) the non-hopper dredge must be chartered to fulfill dredging obligations under a specific contract, including any extension periods, *or* as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the ves-

> sel is in a position to fully resume dredging operations; and (4) the exemption expires on the earlier of December 8, 2022 or when the vessel STUYVESANT ceases to be documented under 46 U.S.C. ch. 121.

App., *infra*, 8a (internal citations omitted; emphasis in original)

The court did not believe it implicit in these provisions that a non-hopper dredge "could only be used in a supplemental or replacement capacity" for the *Stuyvesant* or another hopper documented as of 1992 because Congress did not enact "express language to that effect." *Id.* at 9a.

Applying this interpretation to the facts, the Federal Circuit held that the *Meridian* met clause (A)(iii)'s prerequisites and therefore qualified for the grandfather exception. App., *infra*, 10a-11a. In doing so, the court declined to discuss the long-standing canon, followed by this Court and other courts of appeals, that a grandfather exception must be strictly construed so that it does not frustrate the remedial goals intended by the main enactment.[5]

REASONS FOR GRANTING THE PETITION

This case presents a question of great practical importance to domestic maritime commerce. Congress acted in

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[5] Although the Federal Circuit endorsed the Government's (and Bean Stuyvesant's) interpretation of the statute, it did not — despite the Government's urging — defer to private letter rulings of the Bureau of Customs and Border Protection that approved Bean Stuyvesant's chartering of non-hopper dredges. Norfolk had argued that, under decisions of this Court including *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), such rulings are not entitled to *Chevron* deference because they are not the product of notice-and-comment rulemaking or formal adjudication and were not intended by Congress to be binding beyond the parties to the particular private letter ruling.

1992 to assure U.S. control of an essential industry that maintains, and provides deepwater access to, U.S. ports. But under the court of appeals' holding, *all* non-hopper dredges (which make up the vast bulk of the dredging fleet) may be chartered to foreign-owned companies, so long as SDC has any ownership interest in those companies. Moreover, the Federal Circuit's holding creates the extraordinary circumstance where one foreign company is authorized to determine which foreign entities may engage in dredging in U.S. waters. And it confers unique competitive advantages on SDC relative to U.S. dredging companies, which could well lead to foreign domination of the U.S. dredging market. Because the Federal Circuit reached this result through use of an analysis that cannot be reconciled with the approach to statutory construction that is mandated by this Court and followed by other courts of appeals, further review is warranted.

I. THE FEDERAL CIRCUIT'S DECISION, WHICH OPENS THE DOMESTIC DREDGING MARKET TO FOREIGN FIRMS, WILL UNDERMINE BOTH THE HEALTH OF THE U.S. DREDGING INDUSTRY AND LONGSTANDING FEDERAL POLICY

In the words of the Court of Federal Claims, the interpretation of the Oceans Act's grandfather exception that was endorsed by the Federal Circuit "would allow for unlimited expansion by Stuyvesant Dredging Company [or entities in which it holds an interest] into the non-hopper dredging business." App., *infra*, 46a. Given the importance of such an outcome, it should not stand absent this Court's plenary review.

1. As noted above, the U.S. cabotage laws reflect fundamental federal policy "to assure reliable domestic shipping service and the existence of a maritime capability that is completely subject to national control in times of war and national emergency." U.S. Dept. of Transportation, Maritime Administration, *By the Capes—A Primer on U.S. Coastwise*

Laws (available at http://www.marad.dot.gov/publications/primer_laws.html). The Oceans Act was designed to ensure the effectiveness of that policy as it applies to the dredging industry. An industry witness testifying before Congress explained that the Ocean Act's "application of the 75% citizenship requirement to the 'charterer' will preclude foreign interests from concealing foreign ownership of dredges by means of utilizing dummy domestic corporations for the purpose of bareboat and demise charters." Statement of DeWitt D. Barlow, III on H.R. 3921 Before The Subcomm. On Merchant Marine, Comm. On Merchant Marine And Fisheries (Feb. 7, 1990). The Oceans Act's key sponsor endorsed that view, stating that "[t]he purpose of this restriction is to ensure that these vessels are always under the control of U.S. citizens." 138 Cong. Rec. H5006-02, H5018 (remarks of Rep. Tauzin).

Complementing the homeland security goal of the cabotage laws is the economic policy of reserving U.S. maritime commerce for domestic dredging firms, which lack certain advantages enjoyed by foreign dredging companies. The economic stakes are substantial: as noted above, revenues of the U.S. dredging industry are on the order of $1 billion annually.

2. The Federal Circuit's holding, however, will directly undercut these policies. The court's reading of the grandfather provision allows SDC – or any other foreign entity in which SDC has even a minimal ownership interest – to expand its U.S. dredging business, and the vessels under its control, virtually without limit. Under the Federal Circuit's rule, there would be nothing to prevent foreign interests from controlling (or, for that matter, owning) every non-hopper dredge operating in U.S. waters.

This is not an alarmist view. It is entirely realistic to think that SDC and related entities could come to dominate the U.S. dredging market. SDC's parent, Boskalis, is far and

away the largest dredging company in the world; its revenues exceed the *entire* Army Corps of Engineers dredging budget for the rest of the domestic dredging industry. 2003 Joint Hearing (statement of Richard S. Weeks, Dredging Contractors of America (available at http://www.house.gov/transportation/water/04-30-03/weeks.html). Boskalis, which currently operates in 50 countries on five continents, candidly acknowledges its aspiration to make the United States one of its "home markets," which is to say, to develop "its own fleets and infrastructures" and "extend [its] range of activities" in this country. Royal Boskalis Westminster NV website (http://www.boskalis.com).

In pursuing this business, SDC and other foreign-owned entities would have several significant competitive advantages over U.S. dredging companies – the importance of which are magnified enormously by the Federal Circuit's reading of the grandfather provision to allow limitless expansion of the number of non-hopper vessels controlled by SDC.

First, unlike any other U.S. flag dredging operation, an entity in which SDC has an interest may adjust to changing market conditions by re-documenting its U.S. flag non-hopper dredges under a foreign flag (which may be a requirement of the country in which a foreign dredging job is located), and then bringing the vessels back under U.S. flag at a later date. See Customs Letter Ruling HQ 114247 (Feb. 17, 1998). All other U.S. companies are permanently barred from returning vessels to U.S. flag under similar circumstances.[6] Thus, U.S. companies are competitively disadvantaged vis-à-vis SDC entities because they are unable to react

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[6] This is so because the 1992 Oceans Act requires that all dredges operating in the U.S. have a "coastwise endorsement," and only those vessels that have *always* been under U.S. documentation are eligible for such an endorsement. 46 C.F.R. § 67.19(d)(2). But the grandfather provision exempts *Stuyvesant*-related dredges from the 1992 requirements.

to market changes by moving vessels between the U.S. and other nations.

Second, companies with foreign owners may obtain a competitive edge over U.S. businesses by engaging in transfer pricing or by transferring profits overseas. Foreign entities may price their services to affiliated U.S. operations at an artificially high level, leaving the U.S. entity with little or no taxable income. A similar result could be achieved by inversions, investment, or other means that transfer revenues.

Third, affiliation with a foreign entity provides a variety of other competitive advantages. A "deep pocket" foreign partner offers access to foreign capital and an opportunity to obtain performance bonds in larger amounts than would otherwise be available, giving SDC and related entities the flexibility to bid on larger projects than comparable U.S. firms. Moreover, foreign companies may operate in countries where U.S. businesses are barred (such as Iran) and are not subject to the Foreign Corrupt Practices Act, providing additional sources of financial strength that can be used to bolster competition with U.S. dredging companies.

Against this background, it is not surprising that the SDC-affiliated Bean Stuyvesant has achieved substantial competitive success in the U.S. – and that Boskalis has come to dominate the dredging market in other countries. Bean Stuyvesant's market share of Corps of Engineers dredging contracts in the U.S. rocketed from zero prior to fiscal year 1999 to 17% in fiscal year 2001-2002, when it diminished after the commencement of this litigation. CBO Letter Report (Oct. 21, 2003) (available at http://www.iwr.usace.army.mil/ndc/dredge/dredge.htm).

3. The practical importance of the question presented makes the proper interpretation of the Ocean Act's grandfather provision a serious candidate for certiorari. And review is especially appropriate because, due to the vagaries of the Federal Circuit's jurisdiction, no circuit split ever can de-

velop on the meaning of the provision.[7] Absent review by this Court, then, the Federal Circuit's ruling as to an issue of great national significance will stand and will govern all future dredging contracts nationwide. That should not be permitted. Indeed, the Court in recent years repeatedly has reviewed questionable decisions of the Federal Circuit even in the absence of a conflict in the circuits.[8] In the words of

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[7] See, *e.g.*, Nies, *Dissents at the Federal Circuit and Supreme Court Review*, 45 AM. U. L. REV. 1519, 1519 (1996) ("[T]he Federal Circuit is unique among the thirteen federal courts of appeals. Due to overlapping areas of jurisdiction, our sister circuit courts may develop differing views on the law. These 'intercircuit conflicts' are a frequent trigger for Supreme Court review. * * * In the areas in which [the Federal Circuit] exercises exclusive jurisdiction, this traditional type of intercircuit debate cannot arise.").

[8] See, *e.g.*, *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (reversing Federal Circuit in connection with interpretations of Indian Tucker Act and Indian Mineral Leasing Act of 1938); *Franconia Assocs.* v. *United States*, 536 U.S. 129 (2002) (reversing Federal Circuit in connection with interpretation of Emergency Low Income Housing Preservation Act of 1987 and Tucker Act); *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 7 (2001) (reversing Federal Circuit's "sweeping rule that the [Merit Systems Protection] Board may never rely on prior disciplinary actions subject to ongoing grievance procedures" to assess penalties); *United States* v. *Mead Corp.*, 533 U.S. 218 (2001) (reversing Federal Circuit in connection with interpretation of Customs Service letters); *Shalala* v. *Whitecotton*, 514 U.S. 268, 274 (1995) (reversing Federal Circuit in connection with interpretation of provision of National Childhood Vaccine Injury Act of 1986 that "simply [did] not square with the plain language of the statute."); *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179 (1995) (reversing Federal Circuit in connection with interpretation of the Plant Variety Protection Act); *United States* v. *Hill*, 506 U.S. 546, 549 (1993) (reversing Federal Circuit in connection with interpretation of tax-code provision); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989) (reversing Federal Circuit in connection with interpretation of tax-code provision); *United States* v. *American Bar Endowment*,

the Solicitor General, "[i]n similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance." *United States* v. *Mead Corp.*, No. 99-1434, U.S. Pet. 23.

In *United States* v. *Mead Corp.*, *supra*, to offer just one example, this Court granted certiorari where the Federal Circuit had held that Customs Service ruling letters were entitled to no deference at all. As here, the specific interpretation at issue had no applicability outside the Federal Circuit, as Customs classifications such as those at issue in the case necessarily came to the Federal Circuit. Yet, as the Solicitor General explained, the grant of certiorari was appropriate because, "[a]bsent review by this Court * * * the decision in this case * * * will have binding effect throughout the Nation." *United States* v. *Mead Corp.*, No. 99-1434, U.S. Pet. 23.[9]

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477 U.S. 105, 109 (1986) (reversing Federal Circuit in connection with interpretation of tax-code provision).

[9] So, too, in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), the Court granted certiorari in a $156 million dispute, despite the fact that the case involved an isolated government contract affecting only two parties and an issue that would be unlikely to arise in the future. Two companies sought restitution of $156 million that they had paid the Government to obtain oil exploration rights in the Outer Banks off North Carolina under lease contracts executed in 1981. *Id.* at 607. In 1990, in reliance on a recently enacted law (the Outer Banks Protection Act of 1990 (OBPA)), the government notified the companies that their exploration plan could not be approved because it failed to satisfy OBPA. *Id.* at 612-13. The companies sought restitution of their $156 million payment, contending that the government's disapproval of the Exploration Plan violated the terms of the 1981 lease contracts. *Id.* at 613. The Federal Circuit held that the companies could not recover, but this Court granted certiorari and reversed. *Id.* at 624. The amounts at stake in this litiga-

This case is at least as strong a candidate for review as was *Mead*. Whereas there is no suggestion in the *Mead* opinion that any entity besides Mead itself was affected by the government's tariff classification of its "day planners," *all* U.S. dredging companies that compete with SDC-affiliated entities may be affected by the ruling below. In such circumstances, the Court should not be dissuaded from granting certiorari by the absence of intercircuit conflict regarding the meaning of the Oceans Act's grandfather clause.

II. THE FEDERAL CIRCUIT'S DECISION IS WRONG

The need for review is particularly acute because the Federal Circuit's decision is manifestly wrong. That decision allows certain foreign entities essentially unlimited access to the U.S. domestic non-hopper dredging market. It does so by reading clause (A)(iii) of the Oceans Act's grandfather provision in complete isolation from the remainder of the grandfather provision. The court interpreted that clause to mean that *any* entity in which SDC has *any* ownership interest may charter a non-hopper dredge to use in U.S. waters for *any* purpose, so long as the charter is necessary to fulfill obligations under "a specific contract" – which is hardly a limitation. This understanding of the grandfather provision allows SDC, its owner Boskalis, and any entity in which SDC acquires an interest to go far beyond the type of business conducted by SDC when the grandfather provision was enacted in 1992. At that time, SDC engaged only in hopper dredging through use of the vessel *Stuyvesant*; it did *not* participate in the much larger non-hopper segment of the market.

When the various elements of the grandfather provision are read in statutory context, however, it is plain that Con-

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tion are potentially much larger, as the Federal Circuit's rule will determine entitlement to compete for dredging contracts that annually amount to many hundreds of millions of dollars.

gress intended SDC and related entities to use non-hopper vessels only (1) as a supplement to hopper dredge projects that (2) are performed by the *Stuyvesant* or other specified hopper dredges and that (3) thus are the sort of project that SDC engaged in at the time of enactment of the grandfather clause. That construction is the only one that reads the statute as a whole. It is the only reading consistent with the rule that grandfather clauses should be construed narrowly, so as to avoid undermining the principal statutory purpose. And it is the only approach that fulfills the clear congressional purpose to *tighten* restrictions on foreign dredging activities in U.S. waters. Because the Federal Circuit misconstrued the grandfather clause – and because its reasoning departs from the approach to statutory construction used by this Court and other courts of appeals – further review is in order.

A. The Federal Circuit's Decision Erroneously Treats Each Subparagraph Of The Grandfather Exception In Isolation.

As this Court very recently and emphatically affirmed, "[s]tatutory construction is a 'holistic endeavor.'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, No. 03-377 (U.S. Nov. 30, 2004), slip op. 8 (quoting *United Sav. Assn. Of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). See, *e.g.*, *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993); *Smith* v. *United States*, 508 U.S. 223, 233 (1993). This means that "statutory language must be read in its proper context and not viewed in isolation." *Koons Buick Pontiac*, slip op. 8 (citing *McCarthy* v. *Bronson*, 500 U.S. 136, 139 (1991)). Indeed, even when a majority of the Circuits has adopted a certain interpretation of a statute, this Court has not hesitated to disagree when it concludes that the construction adopted by those courts fails "to consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey* v. *United States*, 516 U.S. 137,

145 (1995). As a general matter, the courts of appeals faithfully adhere to this principle.[10]

The Federal Circuit, however, flatly declined to follow this approach. Without citing a single authority, the Federal Circuit held that, where clauses of a statutory provision are "self-contained" and "semi-colon delimited," the clauses are "independent of each other." App., *infra*, 7a. Only by interpreting clause (A)(iii) in isolation from the other clauses and subparagraphs of the grandfather exception was the Federal Circuit able to arrive at its interpretation: that SDC or any entity in which it owns any interest may charter any documented non-hopper dredging vessel to perform any dredging contract in whole or in part.

But this is akin to reasoning that elephants are thin and round by looking only at their trunks. Read in context, clause (a)(iii) must be tied to the type of hopper dredge business that SDC conducted through use of the *Stuyvesant* at the time of the clause's enactment in 1992.

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[10] See, *e.g.*, *Langhorne* v. *Ashcroft*, 377 F.3d 175, 180 (2d Cir. 2004) ("[I]t is axiomatic that a section of a statute should not be read in isolation from the context of the whole Act * * *") (internal quotation marks omitted); *Goswami* v. *American Collections Enter.*, 377 F.3d 488 (5th Cir. 2004) (subsection of statute that is clear in isolation became ambiguous when interpreted, as is proper, in context); *Ortloff* v. *United States*, 335 F.3d 652, 658 (7th Cir. 2003) ("[W]e cannot parse the 'any other law enforcement' language [apart] from the remainder of 2680(c), but rather that language must be read as part of the totality of 2680(c)"), cert. denied, 124 S.Ct. 1520 (2004); *Social Sec. Admin* v. *FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000) (Back Pay Act section's meaning cannot be discerned "in isolation, but must be drawn from the context in which it is used"); *Leisnoi, Inc.* v. *Stratman*, 154 F.3d 1062, 1066 (9th Cir. 1998) ("We [] interpret the phrase 'lands within the boundaries of any Native village,' by looking, first, to the surrounding words in 14(f) * * * and then to other provisions in [Alaska Native Claims Settlement Act]").

To begin with, all three clauses in subparagraph (A) of the grandfather provision are tied to the *Stuyvesant*, the only vessel that SDC operated in U.S. waters at the time of enactment. Clause (A)(i) refers *only* to the *Stuyvesant* itself. And clauses (A)(ii) and (A)(iii) give SDC authority to operate other dredges in U.S. waters only while the *Stuyvesant* is documented under the U.S. flag or during its useful life, whichever ends sooner. These provisions make sense only if they are understood to limit SDC to the types of activities in which it engaged at the time of enactment through use of the *Stuyvesant*.[11] Otherwise, it is difficult to understand why Congress would have sought to terminate SDC's U.S. business when the *Stuyvesant* ceases to be documented, and, in any event, no later than 2022.

Moreover, as the Court of Federal Claims recognized, each of the subparagraphs of the grandfather clause is "directed to a *vessel*, not to a company." App., *infra*, 34a (emphasis added) (citing 46 U.S.C. App. § 292 note (a)(2)(A)-(D)). The Federal Circuit's approach, in contrast, focuses on SDC and gives that company (and all other entities in which it has an ownership interest) carte blanche to expand their U.S. dredging operations without limit. The effect is to have one clause swallow the remainder of a lengthy and complex statutory provision. That outcome violates "the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, __, 124 S. Ct. 1236, 1246 (2004) (internal quotation marks omitted).

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[11] The point is confirmed by clause (A)(ii), which gives grandfather protection to SDC's use of hopper dredges other than the *Stuyvesant* only if those vessels were "documented under chapter 121 of title 46, United States Code before the effective date of this Act [Nov. 4, 1992]." By limiting the universe of hopper vessels that could benefit from the grandfather provision, Congress put distinct limits on the possible expansion of SDC's business.

B. The Federal Circuit Ignored The Long-Standing Canon That A Grandfather Exception Must Be Strictly Construed.

To the extent that any doubt remains as to the meaning of clause (A)(iii) after reading it in context, that doubt is resolved by the long-standing canon that "exceptions from a general policy which a law embodies [must] be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." *Spokane & Inland Empire R.R. Co.* v. *United States*, 241 U.S. 344, 350 (1916). Numerous lower courts have adhered to this principle in the specific situation of an exception that, as here, provides "grandfather" protections. See, *e.g.*, *United States* v. *Articles of Drug*, 745 F.2d 105, 113 (1st Cir. 1984) ("[A]s an exemption to a comprehensive regulatory statute concerned with public safety, the grandfather clause is to be strictly construed * * *."); *United States* v. *Allan Drug Corp.*, 357 F.2d 713, 718 (10th Cir. 1966) ("Since we are dealing with a Grandfather Clause exception, we must construe it strictly against one who invokes it.") (citing *Spokane*). See also *United States* v. *Kanasco, Ltd.*, 123 F.3d 209, 212 (4th Cir. 1997) (quoting *Spokane*).

The Federal Circuit ignored this canon entirely, notwithstanding Norfolk's invocation of it below. See Norfolk Op. Br. (C.A. Fed. No. 04-5040), at 26. But this case surely is one in which the canon should control. There is no dispute about the overriding purpose of the relevant portion of the Oceans Act: it was intended to "close loopholes" and "make all domestically operated dredges subject to the same documentation and ownership requirements as other vessels under the coastwise trade laws." 138 Cong. Rec. H5006-02, H5017 (remarks of Rep. Tauzin). And it is undeniable that, the broader the reading given the grandfather exception, the more this statutory purpose will be undermined. Indeed, members of Congress have noted, in specific reference to SDC's expansive invocation of the grandfather clause, that

"[t]here certainly is a deep impression here that the loophole has been exploited" (2003 Joint Hearing Tr. 71 (remarks of Rep. Costello)) and that "it looks like there was a camel's nose some years back and it has gotten to be a pretty big camel lately." *Id.* at 88 (remarks of Rep. Baird).

Applied here, the canon resolves any dispute between respondents' expansive interpretation of the grandfather clause (that any entity in which SDC has an interest may charter any documented non-hopper dredge to perform an entire dredging contract) and Norfolk's narrow interpretation (that the non-hopper may be chartered only to supplement or replace another qualifying vessel). Respondents' interpretation cuts a vastly broader swath from the main enactment's policy to reserve dredging contracts to U.S.-controlled vessels, and therefore is disfavored.

C. The Federal Circuit Ignored The Legislative History Of The Oceans Act, Which Confirms That The Grandfather Exception Applies Only To Non-Hopper Vessels Used To Supplement Or Temporarily Replace A Qualifying Hopper Dredge.

The Federal Circuit declined to consider not only the interpretive canon just discussed, but also the legislative history of the Oceans Act, which confirms the limited nature of the grandfather exception. The Court of Federal Claims, by contrast, discussed the legislative history in some detail and found it to support the common sense view that clause (A)(iii) of the grandfather exception requires that a non-hopper vessel be chartered to supplement or temporarily replace a qualifying hopper vessel (either the *Stuyvesant* or another hopper documented prior to November 1992).

Indeed, an interpretation of the clause that allows SDC to expand its business into the non-hopper market would turn the 1992 legislation on its head. At the time of enactment, SDC had "operated a single hopper dredge [*i.e.*. the *Stuyve-*

sant] for ten years – it had never participated in any other type of dredging business." 2003 Joint Hearing (statement of Rep. Schrock). Even this limited foreign operation in the U.S. dredging market was regarded as inconsistent with U.S. security, and is what caused Congress in 1992 "to amen[d] the dredging laws * * * to ensure that dredging vessels are always under the control of U.S. citizens." 2003 Joint Hearing (statement of Richard S. Weeks, Dredging Contractors of America), at 1 (emphasis in original) (available at http://www.house.gov/transportation/water/04-30-03/weeks.html). See *id.* at 3 (foreign control of the *Stuyvesant* "was the impetus behind the 1992 Amendment to the Dredging Statute"). And while Congress believed that it would be fair to provide grandfather protection for SDC's existing operations, it surely did not countenance a dramatic expansion of U.S. activities by SDC (or other entities in which it has an interest). Thus, the key proponent of the Oceans Act explained that it grandfathers "*existing*" fleets. 138 Cong. Rec. H5006-02, H5018 (remarks of Rep. Tauzin) (emphasis added). Similarly, the section-by-section analysis of the statute recited that "[s]ubsection (a)(2) of the bill grandfathers certain *existing* vessels that do not currently comply with these new requirements and vessels that are used as an integral part of an operation where dredging is a minority of the total costs of that operation." 138 Cong. Rec. H11766, H11789 (Oct. 5, 1992) (emphasis added). See also 2003 Joint Hearing (statement of Rep. Schrock) ("When Congress acted to close that loophole in 1992, it also sought to protect the *existing business* of" SDC) (emphasis in original).

Against this background, "[t]here is scant indication that Congress meant" to allow SDC to vastly expand its U.S. operations, using non-hopper dredges that did not exist at the time of the grandfather clause's enactment. *Koons Buick Pontiac*, slip op. 11. And that is especially so because, as Representative Tauzin explained, the Oceans Act was "written in cooperation with the U.S. dredging operators." 138

Cong. Rec. H5006-02, H5017. In this context, "[a]ll in all, * * * this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect [respondents] ascribe[] to it would have been differently described by its sponsor, and not nearly as readily accepted by" the industry association that participated in its drafting. *Church of Scientology of Cal.* v. *IRS*, 484 U.S. 9, 17-18 (1987). See *Koons Buick Pontiac*, slip op. 11.

The Court of Federal Claims carefully examined this legislative history and found it to corroborate the court's contextual statutory interpretation:

> An intent to grandfather in 'existing vessels' and 'protect existing dredging operations' is not ambiguous, as defendant argues, or inconsistent with the construction adopted. Congress consistently sought to confine foreign dredging operations. In the first instance, the legislation confined the operations to the vessel STUYVESANT only. Subsequently, Stuyvesant Dredging Company's activities were limited to hoppers documented before November 4, 1992, and to non-hoppers that would fulfill obligations under contracts (or their extensions) performed by hoppers documented prior to 1992 or as temporary replacements for hoppers or non-hoppers performing hopper contracts.

App., *infra*, 45a-46a.

The Federal Circuit, by contrast, wholly ignored this legislative history, compounding its erroneous failure to read clause (A)(iii) in context or to apply the canon against broad constructions of grandfather exceptions. The result is a clear departure from the congressional purpose that will undermine an important federal policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2004

APPENDIX

United States Court of Appeals,
Federal Circuit.

NORFOLK DREDGING COMPANY, INC.,
Plaintiff-Appellee,

v.

UNITED STATES, Defendant-Appellant,

and

Bean Stuyvesant, L.L.C., Defendant-Appellant.

Nos. 04-5040, 04-5041.

DECIDED: July 7, 2004.
Rehearing En Banc Denied Aug. 13, 2004.

Before NEWMAN, RADER, and LINN, Circuit Judges.

LINN, Circuit Judge.

Bean Stuyvesant L.L.C. ("Bean") and the United States ("Government") (collectively, "Appellants") appeal from a decision of the Court of Federal Claims granting summary judgment in favor of Norfolk Dredging ("Norfolk") and enjoining the Army Corps of Engineers ("Corps") from awarding a dredging contract to Bean. *Norfolk Dredging Co. v. United States*, 58 Fed.Cl. 741 (2003) ("*Norfolk II*"). Because the Court of Federal Claims erred in construing the statutory exception to 46 U.S.C. app. § 292 and in concluding that Bean's activities did not fall within the scope of the statutory exception, we reverse and remand to the Court of Federal Claims with instructions to enter summary judgment in favor of Appellants.

BACKGROUND

This is a bid protest action challenging the legality of Bean's performance of dredging operations under Corps solicitation no. DACW54-03-B-0011 ("the contract"). Bean is a

limited liability company organized under Delaware law. Bean is 50% owned by Bean Dredging L.L.C., a U.S. company, and 50% owned by Stuyvesant Dredging Co. ("SDC"), which is in turn wholly owned by a Dutch corporation. Thus, Bean is 50% foreign owned. The MERIDIAN is a non-hopper dredge owned by a U.S. company, Bean Meridian L.L.C. ("Bean Meridian"), and is documented under 46 U.S.C. ch. 121. Hopper dredges are self-propelled vessels that pump dredged material from the channel floor and store the material in containers called hoppers aboard the vessel. Non-hopper vessels are unable to store the dredged material on board; the dredged material must be piped to a separate vessel or location.

On August 8, 2003, the Corps issued bid solicitation no. DACW54-03-B-0011 for dredging in the vicinity of Morehead City Inner Harbor, North Carolina. Because of environmental concerns, the placement of dredged material on the beaches was to be completed between November 2003 and April 2004. Bean was the low bidder, and proposed performing the work using the MERIDIAN, a non-hopper dredging vessel chartered from Bean Meridian. Norfolk was the second lowest bidder.

Norfolk filed an expedited bid protest action in the Court of Federal Claims challenging the legality of Intervenor Bean's performance of the dredging operations in alleged violation of the terms of § 5501 of the Oceans Act of 1992. The parties agreed that Bean should be initially awarded the contract, subject to termination in the event the Court of Federal Claims should find that Bean was not eligible to perform.

The Court of Federal Claims observed that the Foreign Dredge Act of 1906, as amended by § 5501 of the Oceans Act of 1992 (codified at 46 U.S.C. app. § 292), bars foreign-built dredges from operating in U.S. waters. *Norfolk II*, 58 Fed.Cl. at 743. However, the note following 46 U.S.C. app.

§ 292 contains exceptions that include SDC and any entity in which it owns an interest. *Id.* at 744. Thus, the issue was whether Bean could legally charter a U.S.-built and documented non-hopper dredge under the statutory exception. *Id.* The court construed the statutory exception to 46 U.S.C. app. § 292 to exclude Bean's charter of the non-hopper dredge MERIDIAN pursuant to the contract, and thus Bean was barred from performing the contract by § 5501 of the Oceans Act of 1992. Following the court's denial of the Government's motion for reconsideration, Bean and the Corps entered into a no-cost termination of the contract.

Bean and the Government timely appealed from the Court of Federal Claims' October 14, 2003 order, *Norfolk Dredging Co. v. United States*, 58 Fed.Cl. 167 (2003) ("*Norfolk I*"); November 26, 2003 order on motion for reconsideration; and November 26, 2003 Corrected Opinion and Order, *Norfolk II*. We have jurisdiction from a final judgment of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I. Standard of Review

"This court reviews the Court of Federal Claims' grant of summary judgment de novo." *Billings v. United States*, 322 F.3d 1328, 1332 (Fed.Cir.2003). The underlying issue of statutory construction is a question of law we review de novo. *Id.*

II. Analysis

A. Statutory Construction

The Oceans Act of 1992 ("the Act") changed the law regarding the chartering of dredging vessels in U.S. waters. The Act required that a charterer of a dredging vessel in U.S. waters be at least 75% owned by U.S. citizens. Oceans Act of 1992, § 5501(a)(1), Pub. L. No. 102-587, 106 Stat. 5084, *codified at* 46 U.S.C. app. § 292(a)(2) (2000) (citing the 75%

domestic ownership requirements of 46 U.S.C. app. § 802). However, the Act included the following exceptions to this basic rule:

> The amendment ... does not apply to--
>
> (A) (i) the vessel STUYVESANT, official number 648540;
> (ii) any other hopper dredging vessel documented under chapter 121 of title 46, United States Code before the effective date of this Act and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest; however, this exception expires on December 3, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs; and
> (iii) any other non-hopper dredging vessel documented under chapter 121 and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest, as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs....

Id. § 5501(a)(2), codified at 46 U.S.C. app. § 292 note (2000) (respectively, "exceptions (A)(i)", "(A)(ii)" and "(A)(iii)").

It is undisputed that Bean, the charterer of the non-hopper vessel MERIDIAN, was 50% owned by SDC, a foreign enterprise, and thus is prohibited from chartering vessels for dredging in U.S. waters under the terms of 46 U.S.C. app. § 292(a)(2). *Norfolk II*, 58 Fed.Cl. at 744. The parties principally dispute whether Bean falls into one of the statutory exceptions--(A)(i), (ii), or (iii)--enumerated in the note to 46

U.S.C. app. § 292. The applicability of exception (A)(iii) pertaining to non-hopper dredges is principally contested.

The Court of Federal Claims found that the three statutory exceptions in (A)(i)-(iii) relating to the vessel STUYVESANT, hopper vessels, and non-hopper vessels in § 5501(a)(2) of the Act, were amenable to construction based on their plain meaning. *Norfolk II*, 58 Fed.Cl. at 752. The court concluded that the "only construction that gives effect to all of the conditions set forth in the exception ... and reads all of subsections (A)(i), (ii), and (iii) together" was the following:

> Under subsection (A)(iii), Stuyvesant Dredging Company or an entity in which it has an interest can utilize any non-hopper, even if not yet built, to fulfill contracts entered into utilizing STUYVESANT or any other qualified hopper. In other words, the non-hoppers would be supplemental to the dredging activities involving hoppers. Also, a non-hopper so chartered can be used as a temporary replacement for a hopper or a non-hopper. The latter event would occur when a contract is being performed only by a hopper or a non-hopper that has become disabled.

Id. at 753. The court later noted that

> [a]n arrangement would satisfy [exception (A)(iii)] only if the chartered non-hopper vessel "is necessary ... to fulfill dredging obligations under a specific contract," *supplementing a hopper vessel documented as of 1992*, "including any extension periods," or to complete temporary replacement of a hopper or non-hopper performing a hopper contract.

Id. at 755 (quoting Oceans Act of 1992, § 5501(a)(2)(A)(iii)) (emphasis added).

Appellants argue that the Court of Federal Claims erred in interpreting the statute such that Bean's chartering of the non-hopper dredge MERIDIAN did not fall into exception (A)(iii). They allege that the Court of Federal Claims' statu-

tory interpretation is at odds with the structure of the exceptions in 46 U.S.C. app. § 292 note. According to Appellants, exception (A)(i) applies to the vessel STUYVESANT itself; exception (A)(ii) applies to "any other hopper dredging vessel"; and exception (A)(iii) applies to "any other non-hopper dredging vessel." Because these clauses are separated by semi-colons, Appellants argue that the three numbered clauses are independent. They argue that the Court of Federal Claims impermissibly read limitations into the plain and unambiguous statutory language of exception (A)(iii), specifically that the non-hopper dredges must be documented before the effective date of the Act, and that utilized non-hopper dredges must be supplemental to the dredging activity involving hoppers. Appellants contend that if Congress had intended exception (A)(iii) to apply only to non-hopper dredges documented as of 1992, the date the Act was enacted, it could have said so explicitly, just as it specified in exception (A)(ii). They argue that tying all three exceptions to the operation of hopper vessels was erroneous.

Norfolk responds that the Court of Federal Claims properly interpreted the plain language of the statute. It argues that the statute was intended to exempt vessels, not companies, and was intended to provide for the continued availability of the vessel STUYVESANT, not SDC. Contrary to Appellants' arguments, Norfolk argues the court did not read in limitations from the legislative history, but instead based its statutory construction on the plain meaning. Under Appellants' construction, allowing foreign-owned companies like Bean to engage in unlimited non-hopper dredging makes the language "as is necessary ... to fulfill dredging obligations under a specific contract" in exception (A)(iii) completely superfluous--thus allowing an exception to swallow the rule.

Statutory interpretation begins with the language of the statute. *Williams v. Taylor*, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). A court derives the plain meaning of the statute from its text and structure. *Alexander*

v. Sandoval, 532 U.S. 275, 288, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). If the language is clear and fits the case, the plain meaning of the statute generally will be regarded as conclusive. *Sullivan v. Stroop*, 496 U.S. 478, 482, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990); *see also VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579-80 (Fed.Cir.1990) (noting that unambiguous statutory language controls, unless legislative intent is clearly contrary or when its application produces a result so unlikely that Congress could not have intended it). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

The language of the statute at issue in this case is clear and unambiguous, and absent extraordinary circumstances our inquiry must end here. *See VE Holding*, 917 F.2d at 1580. Thus, it is unnecessary to seek clarification in the admittedly sparse legislative history. *See Norfolk II*, 58 Fed. Cl. at 756 ("The legislative history is limited.").

The exceptions pertaining to SDC set forth in 46 U.S.C. app. § 292 note apply to three categories of vessels in which SDC has an ownership interest, each set forth in its own separate subparagraph. The three exceptions are separated by semi-colons and do not expressly incorporate the requirements of any other exception. Exception (A)(i) pertains to the hopper vessel STUYVESANT. Oceans Act of 1992, § 5501(a)(2)(A)(i). Exception (A)(ii) concerns "any other hopper dredging vessel" and imposes certain further limitations as to which hopper dredges it exempts. *Id.* § 5501(a)(2)(A)(ii). Similarly, exemption (A)(iii) concerns "any other non-hopper dredging vessel" with certain further limitations on the scope of the exemption. *Id.* § 5501(a)(2)(A)(iii). These three self-contained, semi-colon delimited subparagraphs are independent of each other.

Exemption (A)(iii) provides:

> (iii) any other non-hopper dredging vessel documented under chapter 121 and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest, as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs;

Id. § 5501(a)(2)(A)(iii). Under exemption (A)(iii), non-hopper dredges are released from the prohibitions of 46 U.S.C. app. § 292 under the following conditions: (1) the non-hopper dredge must be documented under 46 U.S.C. ch. 121, *id.*; (2) the non-hopper dredge must be "chartered to [SDC] or to an entity in which it has an ownership interest," *id.*; (3) the non-hopper dredge must be chartered to fulfill dredging obligations under a specific contract, including any extension periods, or as temporary replacement capacity for a vessel which has become disabled, but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations, *id.*; and (4) the exemption expires on the earlier of December 8, 2022 or when the vessel STUYVESANT ceases to be documented under 46 U.S.C. ch. 121. *Id.*

In urging us to adopt the statutory construction of the Court of Federal Claims, Norfolk argues that the court's importation of two additional limitations not present in the statutory language was correct. As outlined previously, the Court of Federal Claims interpreted exception (A)(iii) to require that non-hopper dredges could only be used "to fulfill contracts entered into utilizing STUYVESANT or any other

qualified hopper." *Norfolk II*, 58 Fed.Cl. at 753. Further, the court required the supplemental chartering of a non-hopper dredge under an existing contract for "any other qualified hopper" was only allowable to "supplement[ ] a hopper vessel documented as of 1992," the date the Oceans Act was enacted. *Id.* at 755.

The Court of Federal Claims' interpretation erroneously adds conditions not present in the statutory language. Neither the plain language of exception (A)(iii) nor the structure of the three exceptions pertaining to SDC provides any basis for the court's conclusion that non-hopper dredges could only be used in a supplemental or replacement capacity to fulfill contracts expressly calling for the services of the vessel STUYVESANT or other hopper vessels documented as of 1992. If Congress had intended these additional restrictions, it could easily have added express language to that effect. Neither the Court of Federal Claims nor Norfolk indicated any language in the statutory exceptions to restrict the charter of non-hopper dredges solely to "supplement," or fulfill contracts calling for, the vessel STUVYESANT or other hopper dredges documented as of 1992. There is no express language requiring that non-hopper dredges only supplement, as temporary replacements, hopper dredges that satisfy the requirements of exception (A)(ii). See Oceans Act of 1992, § 5501(a)(2)(A)(iii). It is telling that exception (A)(ii) specifically requires chartered hopper dredges to be "documented under [46 U.S.C. ch. 121] before the effective date of this Act," *id.* § 5501(a)(2)(A)(ii), which was November 24, 1992. Exception (A)(iii) lacks a similar clause. *See id.* § 5501(a)(2)(A)(iii). We conclude that such an omission was intentional. *See Duncan v. Walker*, 533 U.S. 167, 173-74, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (noting that where Congress introduces language in one section yet omits it in another, the disparate inclusion or exclusion is deemed intentional).

Finally, contrary to the Court of Federal Claims' contentions, *Norfolk II*, 58 Fed. Cl. at 758, and Norfolk's arguments, a plain meaning interpretation does not cause the exception to swallow the rule. Exception (A)(iii) does not exempt every non-hopper dredge chartered to commercial entities in which SDC has an ownership interest, but only those that meet the additional criteria enumerated in the exception. The non-hopper dredges must be chartered "to fulfill dredging obligations under a specific contract" or in a "temporary replacement capacity" for a disabled vessel, and the charter must occur before the exception expires. Oceans Act of 1992, § 5501(a)(2)(A)(iii).

B. Present Applicability of Statutory Exemption

Under our preceding statutory interpretation of exception (A)(iii), we conclude that exception (A)(iii) has four requirements. We address Bean's satisfaction of each requirement in turn.

First, the non-hopper dredge must be documented under 46 U.S.C. ch. 121. There is no dispute that the MERIDIAN is a non-hopper dredging vessel documented under 46 U.S.C. ch. 121. *See Norfolk II*, 58 Fed.Cl. at 743.

Second, the non-hopper dredge must be chartered to SDC or to an entity in which it has an ownership interest. There is no dispute that SDC has a 50% ownership interest in Bean. *Id.* at 743-44. The MERIDIAN, in turn, is chartered to Bean. *Id.* at 743. Thus, there is no dispute that the non- hopper dredge MERIDIAN is chartered to Bean, an entity in which SDC has an ownership interest.

Third, the non-hopper dredge must be chartered to fulfill dredging obligations under a specific contract, including any extension periods, or as temporary replacement capacity for a vessel which has become disabled, but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations. Bean proposed that the

MERIDIAN would be chartered to perform dredging contracts under the Corps' contract bidding solicitation no. DACW54-03-B-0011. *See id.* at 743. Bean was the lowest bidder on the contract, and the Corps awarded the contract to Bean. *Id.* Thus, Bean satisfies this requirement because it chartered the MERIDIAN to fulfill dredging obligations under a specific contract.

Fourth, the exemption expires on the earlier of December 8, 2022 or when STUYVESANT ceases to be documented under chapter 121 of Title 46, United States Code. Because the vessel STUYVESANT is currently documented under 46 U.S.C. ch. 121, the statutory exception has not yet expired.

Accordingly, there are no genuine issues of material fact that Bean's chartering of the vessel MERIDIAN pursuant to the contract falls within the correct statutory construction of exception (A)(iii). Thus, we reverse the grant of summary judgment in favor of Norfolk and remand to the Court of Federal Claims with instructions to enter summary judgment in favor of Appellants.

CONCLUSION

Because the Court of Federal Claims erred in its construction of the statutory exception to 46 U.S.C. app. § 292 and because we conclude under the correct construction that Bean falls within the statutory exception, we reverse the grant of summary judgment in favor of Norfolk and remand to the Court of Federal Claims with instructions to enter summary judgment in favor of Appellants Bean and the United States.

REVERSED AND REMANDED.

United States Court of Federal Claims.

NORFOLK DREDGING COMPANY, INC.,
Plaintiff,
v.
The UNITED STATES, Defendant,
and
Bean Stuyvesant, LLC, Defendant-Intervenor.

No. 03-2225C.

Filed Nov. 26, 2003.

CORRECTED OPINION

MILLER, Judge.

This pre-/post-award bid protest action is before the court after argument on the parties' cross-motions for summary judgment. Plaintiff faults the Government for permitting intervenor dredging company, an entity owned by a foreign corporation in combination with a company 50% owned by U.S. citizens, to enlarge an exemption to U.S.-preference legislation that restricts dredging in U.S. waters to U.S.-built, 75% U.S.-citizen-owned vessels and vessels chartered by a U.S. citizen or U.S. entities with no less than 75% U.S.-citizen control.

FACTS

The relevant facts, which are largely undisputed, derive from the administrative record. On August 8, 2003, the U.S. Army Corps of Engineers (the "Corps") issued an Invitation for Bids on Solicitation No. DACW54-03-B-0011 for dredging of Morehead City Harbor, Beaufort Harbor, and Brandt Island, North Carolina. Four sealed bids were received and opened on September 16, 2003.

Bean Stuyvesant, LLC ("intervenor"), was the apparent low bidder at $9,570,800.00. Norfolk Dredging Company, Inc. ("plaintiff"), was the second lowest bidder at

$9,577,560.00. On September 25, 2003, plaintiff filed this protest claiming that intervenor is unqualified to perform the contract. Due to environmental restrictions, the contract may not begin before November 1, 2003, but must be completed by April 30, 2004.[1] Timely award of the contract was crucial because the end of the Government's fiscal year was imminent. Pursuant to an agreement among the parties, the Corps awarded the contract to intervenor on September 30, 2003, despite the pendency of plaintiff's protest.[2] Thus, this protest, while technically filed pre-award, proceeded as a post-award matter.

Plaintiff complains that intervenor is not qualified to perform dredging in U.S. waters as prohibited by the Oceans Act of 1992. 46 U.S.C. app. § 292 (2000). The Oceans Act, a comprehensive Act that includes provisions precluding for-

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[1] The Corps agreed not to issue a notice to proceed, provided that the court ruled on plaintiff's request for a permanent injunction by close of business on October 14, 2003. To that end, the parties requested an accelerated briefing schedule. The complaint was filed on September 25, 2003, followed on September 26 by a preliminary conference to schedule a hearing on plaintiff's application for a temporary restraining order. Intervenor came into the proceedings on September 29. At a scheduling conference held on September 30, the parties agreed to submit simultaneous opening briefs on October 3, with the second round on October 8 and 9. The parties requested a decision by October 14, which was also the first date on which counsel for all parties could participate in oral argument. The court has endeavored to accommodate the parties' needs.

[2] The parties entered into an agreement whereby the Government awarded the contract to intervenor notwithstanding this litigation. If this court rules for the Government, the Corps will issue to intervenor a notice to proceed with performance. If this court enters an injunction, the Government and intervenor have agreed that the contract will be terminated for the convenience of the Government and that no costs will be assessed.

eign citizens from engaging in dredging, was the most recent of laws dating from 1906 that implemented a policy of restricting foreign operations in coastwise trade, vessels plying between U.S. ports. Congress has restricted coastal trade to vessels that are built and documented[3] in the United States, 46 U.S.C. app. § 883 (passed in 1920), and at least 75% U.S.-citizen owned, 46 U.S.C. app. § 802 (passed in 1916). Dredging, specifically, has been limited by the Foreign Dredge Act of 1906, 46 U.S.C. app. § 292, which bars foreign-built dredges from operating in U.S. waters.

To complete the subject contract, intervenor submitted that it will use the dredge MERIDIAN. The MERIDIAN is a U.S.-built, U.S.-documented non-hopper[4] dredge, owned by Bean Meridian, LLC. Non-hopper dredges, which are smaller and more numerous than hoppers, facilitate the bulk of coastwise dredging projects. Plaintiff does not claim that the use of the dredge MERIDIAN is a violation of the applicable statute. Rather, plaintiff contends that intervenor, a Delaware limited liability corporation, cannot charter MERIDIAN under applicable law. Stuyvesant Dredging Company, Inc., a foreign corporation, and Bean Dredging, LLC, a U.S. entity, each own 50% of intervenor. Stuyvesant Dredging Company, in turn, is owned by Royal Boskalis Westminster, NV, a Dutch conglomerate.

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[3] Documented vessels are nationally registered with the U.S. Coast Guard, as opposed to a local or foreign state. Most commercial vessels must be documented, and to qualify the vessel must be wholly owned by a U.S. citizen or U.S. entity with at least 75% U.S. ownership. *See generally* 46 U.S.C. app. § 12101 (2000); 46 C.F.R. § 67 (2002).

[4] A hopper dredge is a self-propelled ocean-going vessel that pumps dredge material from the channel floor and stores that material in containers (hoppers) on board the vessel. Non-hopper vessels do not have the ability to store removed material on board; rather, it must be piped to a separate vessel or location.

While intervenor is 50% foreign owned, 46 U.S.C. app. § 292 contains an exception that includes Stuyvesant Dredging Company and any entity in which it has an interest. At issue is whether intervenor legally may charter a U.S.- built and documented non-hopper dredge under the exception to 46 U.S.C. app. § 292 of the Oceans Act of 1992, found at section 5501(a)(2) of Pub.L. No. 102-587. This exception applies to the vessel STUYVESANT, which, in 1982 began a 40-year charter to Stuyvesant Dredging Company; chartering activities involving hopper and non-hopper vessels of Stuyvesant Dredging Company itself and entities in which the company has an interest; and other dredging vessels described by their ownership or activities. The focus is on the provision governing non-hopper vessels.

DISCUSSION

1. *Jurisdiction and standard of review*

Jurisdiction in the Court of Federal Claims is prescribed by the Tucker Act, 28 U.S.C. § 1491(b)(1) (2000), which allows a protestor to challenge "the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The court evaluates the procuring agency's conduct to determine whether the Government's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed.Cir.2003) (applying "arbitrary and capricious" standard of section 706 under 28 U.S.C. § 1491(b) in post-award bid protest action where Federal Circuit decided "whether the Air Force's procurement decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' "). If a protestor satisfies its burden in proving the requisite violation, the court may award equitable relief pursuant to 28 U.S.C. § 1491(b)(2).

Provisions of the Federal Acquisition Regulation ("FAR"), as incorporated into the solicitation, require that "contracts shall be awarded to[ ] responsible prospective contractors only," and to be determined responsible, a contractor must, *inter alia*, "[b]e otherwise qualified and eligible to receive an award under applicable laws and regulations." 48 C.F.R. (FAR) §§ 9.103-- 9.104-1 (2002). Plaintiff argues that, because intervenor does not qualify for the exception to the 1992 amendment, it is not a "responsible" contractor in that it is not "otherwise eligible and qualified," thereby failing to satisfy 48 C.F.R. § 9.104-1(g).

Plaintiff contends that the relevant provisions of the Oceans Act prohibit intervenor from chartering vessels to dredge in waters of the United States. The Oceans Act amended the Foreign Dredge Act of 1906, which previously had allowed foreign entities to charter U.S.-owned dredges and operate in the United States. After the 1992 amendment, the charterer of the vessel must be a U.S. citizen or an entity with at least 75% U.S.-citizen control. 46 U.S.C. app. §§ 292, 802. The Oceans Act included an exception for the vessel STUYVESANT and Stuyvesant Dredging Company. Plaintiff puts forward that the exception was intended to allow Stuyvesant Dredging Company to continue performance of dredging projects utilizing the hopper dredge STUYVESANT and, if it became disabled, to replace the vessel with other hopper or non-hopper vessels owned either solely by the company or an entity in which it has an interest.

The exception to 46 U.S.C. app. § 292, Pub.L. 102-587 § 5501(a)(2) provides, in pertinent part, as follows:

> "The amendment made by paragraph (1) [amending this section] does not apply to--
> "(A) (i) The vessel STUYVESANT ....
>
> "(ii) any other hopper dredging vessel documented under chapter 121 of title 46, United States Code before the effective date of this Act [Nov. 4, 1992] and

> chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest; however, this exception expires on December 3, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs; and
>
> "(iii) any other non-hopper dredging vessel documented under chapter 121 and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest, as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs; ..."

Plaintiff charges that the Government, through the Bureau of Customs and Border Protection, improperly interpreted the exception to allow Stuyvesant Dredging Company and/or intervenor to expand its business into segments of the dredging industry in which it did not operate before the restriction was enacted.

Defendant counters that intervenor is qualified to perform the contract by chartering the non-hopper vessel MERIDIAN. The applicable section (A)(iii) exception to 46 U.S.C. app. § 292(a) of the Oceans Act, according to defendant, has four requirements: 1) the vessel must be a non-hopper dredge; 2) the vessel must be documented under Chapter 121 of Title 46; 3) the vessel must be chartered to Stuyvesant Dredging Company, or to an entity in which it has an ownership interest, to fulfill dredging obligations under a specific contract; and 4) the dredging must take place prior to De-

cember 8, 2022, or when the vessel STUYVESANT ceases to be documented, whichever occurs first. The parties dispute the effect of requirement three, which defendant argues, rather than maintaining the status quo, allows Stuyvesant Dredging Company (or its parent Royal Boskalis, through Stuyvesant) to expand its dredging operations by entering into new contracts and spawning new entities with no limitation on its ownership interest.[5]

2. *Customs' determinations*

The Bureau of Customs and Border Protection ("Customs")[6] is empowered to issue letter rulings describing its

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[5] Intervenor argues that plaintiff's suit is an improper collateral attack on Customs' interpretation. 5 U.S.C. § 702 (2000) confines challenges to administrative agency action, not involving money damages, to federal district court. Plaintiff challenges the contracting officer's responsibility determination. The contracting officer specifically utilized 46 U.S.C. app. § 292 to render an independent determination based on the facts and information available. The contracting officer was not bound by prior Customs determinations involving different facts. *Stapp Towing, Inc. v. United States*, 34 Fed.Cl. 300, 302 (1995) (acknowledging that, although bound by determination of the Small Business Administration regarding Certificate of Competency, contracting officer has discretion to award contract "based on independent judgment and new information"). Plaintiff is challenging the contracting officer's decision, which reflects his independent judgment informed by Customs decisions, as not in accordance with law. After January 1, 2001, the Court of Federal Claims is the only forum with jurisdiction over a bid protest that challenges a contracting officer's determination as not in accordance with law. 28 U.S.C. § 1491(b)(1). It should be noted that defendant does not support intervenor's argument that jurisdiction lies in another forum.

[6] On March 1, 2003, the U.S. Customs Service was merged with the Border Patrol and made part of the new Department of Homeland Security, prior to which Customs was part of the Department of Transportation.

official position regarding interpretation of maritime laws. 19 C.F.R. § 177.9 (2002). Three letter rulings have been issued regarding the subsection (A)(iii) exception of the Oceans Act--one involving intervenor and two involving Stuyvesant Dredging Company, the 50%-owner of intervenor. Although Customs' decisions may be cited as authority for a similar transaction, "no other person should rely on the ruling letter or assume that the principles of that letter will be applied in connection with any transaction other than the one described in the letter." 19 C.F.R. § 177.9(c). Customs has the right to modify or revoke a letter ruling at any time. Id.

Defendant and intervenor urge the court to sustain Customs' interpretation of the exception. "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). This standard applies so long as "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778.

Only when the court determines that Congress has not addressed the precise issue directly is it necessary to consult an administrative interpretation: When the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. In the present case, the statute is neither silent nor ambiguous with respect to the exception to 46 U.S.C. app. § 292. Where the "plain meaning" of the statute is invoked, the need does not arise for the court to consult

administrative interpretations, within the framework prescribed in *Chevron*.

" 'If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.' " *Kilpatrick v. Principi*, 327 F.3d 1375, 1384 (Fed.Cir.2003) (quoting *Chevron*, U.S. at 843 n. 9, 845, 104 S.Ct. 2778). " 'We only defer ... to agency interpretations of statutes that, applying the normal "tools of statutory construction," are ambiguous.' " *Kilpatrick*, 327 F.3d at 1384 (quoting *INS v. St. Cyr*, 533 U.S. 289, 320 n. 45, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)). However, the Supreme Court has held that *Chevron* deference does not apply to all administrative interpretations, even where the underlying statute is ambiguous. *United States v. Mead Corp.*, 533 U.S. 218, 231, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (denying *Chevron* deference to Customs' letter ruling interpreting tariff regulations when no indication was present that Congress delegated lawmaking authority allowing Customs to make classifications).

The parties have not argued that 46 U.S.C. app. § 292 gives any indication that Congress intended to delegate rule-making authority to Customs. Section 251b of the same act allows the Secretary of the Treasury to issue regulations "necessary for the enforcement of the provisions of this act." The statute indicates that Congress delegated enforcement, rather than rule-making authority.

Customs' interpretations may still "merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency." *Mead Corp.*, 533 U.S. at 234, 121 S.Ct. 2164 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). This "power to persuade" of an administrative agency determination is limited by the "merits of its writer's thoroughness, logic, and expertness, and its fit

with prior interpretations, and other sources of weight." *Id.* at 235, 121 S.Ct. 2164; *see also Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 123 S.Ct. 1017, 1026, 154 L.Ed.2d 972 (2003) (administrative interpretations not product of formal rulemaking "warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift").

Customs issued a letter ruling sought by Stuyvesant Dredging Company addressing whether the subsection (A)(iii) exception allowed Stuyvesant Dredging Company to charter a non-hopper dredge for a contract that the STUYVESANT could not perform. HQ 114247 (Feb. 17, 1998), 1998 U.S. Custom HQ LEXIS 538. Customs announced a four-element test that allows: 1) non-hopper dredges; 2) documented under 46 U.S.C. § 12101; 3) chartered to Stuyvesant Dredging Company to fulfill obligations under a specific contract; which 4) is completed prior to December 8, 2022, or when STUYVESANT ceases to be documented. *Id.* at 3. Customs determined that no ambiguity inhered in the exception requiring a departure from the "plain language." Id. Without further analysis, Customs concluded that Stuyvesant Dredging Company may charter a non-hopper for dredging in the United States. *Id.*

Stuyvesant Dredging Company next sought a letter ruling allowing it to form a separate company in partnership with a U.S. entity, with the new entity engaging in chartering non-hopper dredges for use on a contract-by-contract basis. HQ 114556 (Dec. 15, 1998), 1998 U.S. Custom HQ LEXIS 935. Customs again determined that the exception was clear on its face and, without further discussion ("it is readily apparent"), stated that the new entity may charter non-hopper dredges under the four-part test. *Id.* at 3.

The Corps requested a ruling as to the legality of allowing intervenor, an entity in which Stuyvesant Dredging Com-

pany has an interest, to charter non-hopper dredges, sought its own letter ruling, HQ 115474 (Oct. 5, 2001), 2001 U.S. Custom HQ LEXIS 317. Customs reiterated its position that the exception is unambiguous and that intervenor clearly meets the four requirements. *Id.*[7]

Customs relied on HQ 114556 as authority in deciding HQ 115474, because the former did involve a joint venture similar to intervenor, with similar underlying facts. *Id.*

When interpreting the four requirements of the subsection (A)(iii) exception, Customs failed to analyze the effect of requirement three in conjunction with the entirety of the exception. The statutory language limits non-hopper charters to those "necessary (a) to fulfill dredging operations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging." Customs, invoking the plain meaning, determined that any dredging contract entered into by Stuyvesant Dredging Company or an entity in which it has an interest would fulfill dredging operations under a specific contract. In reading the exception, Customs gave no consideration to the phrases "necessary to fulfill," "extension periods," or the language of subsection (b)(ii) concerning "temporary replacement." Moreover, Customs ignored the relationship between subsections (A)(ii) and (A)(iii) insofar as the former restricts hoppers to those documented as of the date of enactment and the latter, applicable to non-hoppers, contains the phrases quoted above that do not appear in the exception for hopper dredges,

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[7] In HQ 115474, Customs determined that HQ 114247 did not constitute authority for the current issue. HQ 114247 involved Stuyvesant Dredging Company, not a joint venture with Bean Dredging, LLC, as well as different performance requirements on a contract that the vessel STUYVESANT could not perform due to size constraints. *Id.* at 7.

subsection (A)(ii). Customs made no attempt to read these three exceptions in context.

In defending Customs' interpretation, defendant argues "the use of 'as is necessary' in clause 2(A)(iii) is not ambiguous if the language is read in context, as it should be." Def.'s Br. filed Oct. 9, 2003, at 12. When listing the four requirements of (A)(iii), Customs excluded the language "as is necessary." HQ 114247; HQ 114556; HQ 115474. By making no mention of this phrase, Customs ignored whatever effect it may have.

Customs based its decision on the plain meaning of the statutory exception, a determination that this court may review without deference. *See Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (holding administrative interpretation of statute under plain language not entitled to deference). Given Customs' limited examination of the statute, failure to consider all the statutory language, consideration of some phrases out of context, and failure to consider the exception as a whole, this court proceeds to conduct its own analysis of the requirements of the subsection (A)(iii) exception.

3. *Application of legislative history and canons of statutory construction*

The Supreme Court has discussed at length the rule for determining when and how to apply an act's legislative history. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 99, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (Scalia, J., concurring); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-11, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453-54, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). In interpreting a statute, a court must begin with the language of the statute itself. *Demarest*, 498 U.S. at 187, 111 S.Ct. 599; *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

The court then decides whether the language of the statute is ambiguous. Generally, if the language is unambiguous, the court may not refer to the legislative history. *HUD v. Rucker*, 535 U.S. 125, 132, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002); *United States v. Gonzales*, 520 U.S. 1, 6, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997). In the event, however, that a literal reading of the plain language would "compel an odd result," the court must examine the legislative history in order properly to construe the rule, irrespective of the text's ambiguity. *Green*, 490 U.S. at 509-11, 109 S.Ct. 1981 (ambiguous text); *see also Conroy v. Aniskoff*, 507 U.S. 511, 514, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (unambiguous text). "Unquestionably the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results ... or would thwart the obvious purpose of the statute.' " *Commissioner v. Brown*, 380 U.S. 563, 571-72, 85 S.Ct. 1162, 14 L.Ed.2d 75 (1965) (citations omitted) (holding, however, that statute not construed too broadly or contrary to the purpose of the Internal Revenue Code). When interpreting unambiguous statutory language, judicial inquiry is sufficient except where its application as written is " 'demonstrably at odds with the intentions of its drafters.' " *Demarest*, 498 U.S. at 190, 111 S.Ct. 599 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)); *see also Consumer Prod. Safety Comm'n*, 447 U.S. at 108, 100 S.Ct. 2051.

Legislative history is considered when necessary to respond to a party's argument that a literal interpretation would produce an absurd result. In *Conroy* the Supreme Court held that the statute in question was "unambiguous, unequivocal, and unlimited." 507 U.S. at 514, 113 S.Ct. 1562. Respondents argued not against the plain meaning, but that, in the context of the statute as a whole, the textual interpretation produced an absurd result. *Id.* The Court therefore proceeded

to analyze the implications of the legislative history, although ultimately rejecting respondents' argument. *Id.* at 514-18, 113 S.Ct. 1562.[8]

In *Green* the Supreme Court considered whether Fed.R.Evid. 609(a)(1) allowed a civil litigant to attack his adversary's credibility through prior felony convictions. 490 U.S. at 505, 109 S.Ct. 1981. The literal reading of the rule provided a civil defendant rights in connection with impeaching an adversary's testimony that it denied a civil plaintiff. *Id.* at 510, 109 S.Ct. 1981. Following a thorough consultation of the rule's legislative history, including the actions of a "distinguished Advisory Committee appointed at the recommendation of the Judicial Conference of the United States," the House and the Senate, and their corresponding reports, the Court determined that the rule required a "judge to permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony."[9] *Id.* at 515, 527, 109 S.Ct. 1981.

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[8] In his concurring opinion, Justice Scalia wrote that, because the Court held the statute to be unambiguous, all further discussion of legislative history in support of the Court's decision was "false and disruptive." *Conroy*, 507 U.S. at 519, 113 S.Ct. 1562 (Scalia, J., concurring). "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." *Id.* Justice Scalia has cautioned that "committee reports ... are increasingly unreliable evidence of what the voting Members of Congress actually had in mind." *Blanchard*, 489 U.S. at 99, 109 S.Ct. 939 (Scalia, J., concurring).

[9] Justice Scalia agreed that the statute would produce an absurd result and that legislative history should be consulted, although he wrote separately indicating that the emphasis should be on the interpretation most consonant with ordinary usage and thus most likely the meaning adopted by the entire Congress, rather than the Committee Reports likely read by only a few Members of Con-

The Supreme Court in Public Citizen addressed the question of whether the Federal Advisory Committee Act (the "FACA") applies to the advisory relationship between the Department of Justice and the American Bar Association's Standing Committee on Federal Judiciary in the context of federal judgeship appointees. 491 U.S. at 443, 109 S.Ct. 2558. The Court analyzed whether the "advisory committee" is "utilized" by the President "as Congress intended that term to be understood." *Id.* at 452, 109 S.Ct. 2558. In explaining the standard, the Court stated that, where the "literal reading of a statutory term would 'compel an odd result,' ...we must search for other evidence of congressional intent to lend the term its proper scope."[10] *Id.* at 454, 109 S.Ct. 2558 (quoting *Green*, 490 U.S. at 509, 109 S.Ct. 1981). "Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress's intention." *Id.* at 455, 109 S.Ct. 1981. The Court held that Congress could not have intended the FACA to apply to all groups of two or more persons from which the President seeks advice or to consultations with his own political party before selecting a Cabinet member-- an odd result--and thus, examination of legislative intent was appropriate. *Id.* at 453-54, 109 S.Ct. 1981.

The discussion does not end here, however, as the Court of Federal Claims also is bound by the precedent of the

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gress. *Green*, 490 U.S. at 527-28, 109 S.Ct. 1981 (Scalia, J., concurring).

[10] The Court "*explicitly reject[ed]*" the absurdity standard, holding that an "odd result" could also require inquiry into congressional intent. *Public Citizen*, 491 U.S. at 454, n. 9, 109 S.Ct. 2558. Apparently, extending the FACA's requirements to any two people from whom the President seeks advice is thus an "odd," though not necessarily "absurd" result. *See id.* at 452, 109 S.Ct. 2558. This appears to be a fine-line distinction.

United States Court of Claims and the Court of Appeals for the Federal Circuit. *See South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed.Cir.1982) (stating Federal Circuit bound by precedent of former Court of Claims). Moreover, as this court has stated, "when interpreting the decisions of the Federal Circuit, the Court of Federal Claims must endeavor to harmonize precedent to preserve a coherent body of law." *RCS Enters., Inc. v. United States*, 46 Fed.Cl. 509, 517 (2000).

The Federal Circuit agrees that statutory interpretation begins with the language of the statute. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed.Cir.1990) (citing cases). *But see Texas State Comm'n for the Blind v. United States*, 796 F.2d 400, 406 (Fed.Cir.1986) (en banc) (quoting *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)).[11]

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[11] While quoting *Turkette's* language indicating that a court must begin with the plain language, the Federal Circuit, in construing an exemption to the Randolph-Sheppard Vending Stand Act, 20 U.S.C. § 107d3(d), providing, in part, that certain subsections shall not apply to "income from vending machines within retail sales outlets under the control of exchange or ships' stores systems," began by discussing its review of the legislative history and concluded that the funds in question were to be diverted at no cost to the Government and without any decrease in government services, despite characterizing some of the legislative history as "confusing." *Texas,* 796 F.2d at 407 n. 9. The court discussed statements submitted in support of the bill's enactment, the circumstances giving rise to addition of the exemption, a senator's explanation of the bill, and the process preceding its passage in the House of Representatives. *Id.* at 407-11. The actions of the administrative agency in charge of drafting the regulations also were considered, yet no deference was accorded based on its internal vacillations and the agency's failure to propose its own interpretation of the statutory language. *Id.* at 411-12. In determining the statutory purpose, the court examined "not simply the purpose of the legislation, but the

The foregoing precedent instructs that an interpretation consistent with the plain meaning is preferred to cobbling a meaning from the statute's legislative history. A court derives the plain meaning of a statute from its text and structure. *Alexander v. Sandoval*, 532 U.S. 275, 288, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). And, importantly, the statute must be read as a whole. *Conroy*, 507 U.S. at 515, 113 S.Ct. 1562. "The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences." *Beecham v. United States*, 511 U.S. 368, 372, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994) (construing together three provisions of federal firearms statutes). Where Congress introduces language in one section yet omits it another, the disparate inclusion or exclusion is deemed intentional. *Duncan v. Walker*, 533 U.S. 167, 173-74, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001); *see also Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 401 (Fed.Cir.1994) (citing cases) ("[W]here Congress has in-

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purpose of the *exemption*." *Id.* at 414. Then, "[g]iven the congressional purpose of the exemption, the question becomes whether the language can reasonably be interpreted ... to effectuate that purpose." *Id.* The court decided not to parse the lines of this statute, however, because Congress did not debate and carefully choose the wording of the exemption in question. *Id.* at 415.

On the other hand, the compelling dissenting opinion in this case found nothing ambiguous in the statutory language. *Id.* at 417. By ignoring the statutory words "within retail sales outlets," the majority rewrote the statute, according to the dissenters. *Id.* The dissent reasoned that no absurdity resulted from applying the statute as written; rather the "distinction between machines within retail stores and those in other locations appear[ed] to be consistent with Congress's goals and of the compromise struck between the exchange system and the blind." *Id.* at 422-23. Accordingly, the dissent's analysis began and ended with the plain meaning, addressing the risks associated with relying on legislative history that may distort any true congressional intent, if one coherent intent existed. *Id.* at 427.

cluded specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission.").

In *Duncan* the Supreme Court interpreted a statute that provided: " 'The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.' " 533 U.S. at 169, 121 S.Ct. 2120. The Court compared this text with other portions of the statute where "federal" was specifically mentioned and concluded that its omission entailed that an application for federal review would not toll the statute of limitations as did applications for state review. *Id.* at 173-74, 121 S.Ct. 2120. This interpretation also avoided rendering superfluous any words in the statute. *Id.* at 174, 121 S.Ct. 2120. The Court must " 'give effect, if possible, to every clause and word of a statute.' " *Id.* (quoting *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 99 L.Ed. 615 (1955)). The Court also hesitates to employ a construction rendering statutory language redundant. *United States v. Alaska*, 521 U.S. 1, 59-61, 117 S.Ct. 1888, 138 L.Ed.2d 231 (1997).

Yet, these canons of statutory construction are applied with caution, as the Supreme Court has indicated that a canon pointing a court in one direction may often be countered with a maxim moving the court in a different direction. *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001). Canons are not binding rules; they provide guidance to determine legislative intent "as embodied in particular statutory language." *Id.* The Court nonetheless referred to the canon requiring that each word be given effect, if possible, noting that it sometimes is offset by the canon permitting a court to reject surplusage. *Id.* The Court applied this rule in *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 502-03, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) adopting the interpretation that

avoided surplusage and ensuring that similar language contained in the same section was interpreted in the same way.

4. *Interpretation of statutory provision based on its plain meaning*

46 U.S.C. app. § 292(a) provides as follows:

§ 292. Vessels that may engage in dredging

(a) In general

Except as provided in subsection (b) of this section, a vessel may engage in dredging in the navigable waters of the United States only if--

> (1) the vessel meets the requirements of section 883 of this Appendix and sections 802 and 803 of this Appendix for engaging in the coastwise trade;
>
> (2) when chartered, the charterer of the vessel is a citizen of the United States under sections 802 and 803 of this Appendix for engaging in the coastwise trade; and
>
> (3) for a vessel that is at least 5 net tons, the vessel is documented under chapter 121 of title 46 with a coastwise endorsement.

Public Law 102-587 amended 46 U.S.C. app. § 292, "Vessels that may engage in dredging," commonly referred to as the "Foreign Dredge Act." Prior to amendment, the act provided: "A foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States." 46 U.S.C. app. § 292. The current version references several other sections of the United States Code. For example, section 883 entitled "Transportation of merchandise between points in United States in other than domestic built or rebuilt and documented vessels; incineration of hazardous waste at sea" provides, in part, that "[n]o merchandise ... shall be transported by water

... between points in the United States ... in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States ...." Section 802 of the Shipping Appendix entitled "Corporation, partnership, or association as citizen," provides, in part:

> Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation itself is organized under the laws of the United States ... but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

Section 803 states that "[t]he provisions of this chapter shall apply to receivers and trustees of all persons to whom the chapter applies, and to the successors or assignees of such persons." The above-referenced chapter 121, entitled "Documentation of vessels" is found at 46 U.S.C. §§ 12101-12124 and delineates which vessels are eligible for documentation, the effect of documentation, the registry of endorsements and certain limitations and penalties. Specifically, § 12102, "Vessels eligible for documentation" provides, in part, that a vessel that is "not registered under the laws of a foreign country is eligible for documentation if the vessel is owned by ... a corporation established under the laws of the United States or of a State, whose chief executive officer, by whatever title, and chairman of its board of directors are citi-

zens of the United States and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum."

Accordingly, because the parties agree that Bean Stuyvesant, LLC, fails to meet the 75% U.S.-ownership provisions of sections 802-803, required by 46 U.S.C. app. § 292(a)(2), the court looks to the exception to the 1992 amendment entitled "Nonapplicability to Certain Vessels."

The exception to 46 U.S.C. app. § 292(a), Pub.L. 102-587 § 5501(a)(2), provides, in full:

> NONAPPLICABILITY TO CERTAIN VESSELS
> Section 5501(a)(2) of Pub.L. 102-587 provided that: "The amendment made by paragraph (1) [amending this section] does not apply to--
> "(A)(i) the vessel STUYVESANT, official number 648540;
> "(ii) any other hopper dredging vessel documented under chapter 121 of title 46, United States Code before the effective date of this Act [Nov. 4, 1992] and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest; however, this exception expires on December 3, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs; and
> "(iii) any other non-hopper dredging vessel documented under chapter 121 and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest, as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception

expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs;

"(B) the vessel COLUMBUS, official number 590658, except that the vessel's certificate of documentation shall be endorsed to prohibit the vessel from engaging in the transportation of merchandise (except valueless material), including dredge material of value, between places within the navigable waters of the United States;

"(C) a vessel that is engaged in dredged material excavation if that excavation is not more than a minority of the total cost of the construction contract in which the excavation is a single, integral part, and the vessel is--

"(i) built in the United States;

"(ii) a non-self-propelled mechanical clamshell dredging vessel; and

"(iii) owned or chartered by a corporation that had on file with the Secretary of Transportation, on August 1, 1989, the certificate specified in section 27A of the Merchant Marine Act, 1920 (46 App. U.S.C. 883-1); or

"(D) any other documented vessel engaged in dredging and time chartered to an entity that, on August 1, 1989, was, and has continuously remained, the parent of a corporation that had on file with the Secretary of Transportation on August 1, 1989, a certificate specified in section 27A of the Merchant Marine Act, 1920 (46 App. U.S.C. 883-1) if the vessel is--

"(i) not engaged in a federally funded navigation dredging project; and

"(ii) engaged only in dredging associated with, and integral to, accomplishment of that parent's regular business requirements."

The court concludes that the relevant exception in the 1992 amendment is amenable to a construction based on its plain meaning. The exception contains four exemptions from the prohibition. The exception states that the prohibition of less than 75% U.S.-citizen-owned vessels that may engage in dredging does not apply to two vessels, the STUYVESANT and the COLUMBUS, and two other types of vessel described by either the percentage participation or status of chartering entity. Each of these is a limited exception directed to a vessel, not to a company. COLUMBUS is exempted, yet is prohibited from transporting dredge material of value between places within navigable U.S. waters. Section (C) exempts vessels engaged in dredged material excavation only if it is a minor part of a larger construction contract and the vessel was "owned or chartered by a corporation that had on file with the Secretary of Transportation, on August 1, 1989, the certificate specified in section 27A of the Merchant Marine Act, 1920 (46 App. U.S.C. 883-1)." The exemption in section (D) is limited to documented vessels chartered to certain entities satisfying the August 1, 1989 documentation requirements and not engaged in federally funded navigation dredging projects. All four of these exceptions thus are directed to vessels, not to any named or otherwise described company.

With respect to the vessel STUYVESANT, the exception applies to three types of vessels: the STUYVESANT itself, other hopper vessels, and non-hopper vessels. All three types of dredging vessels must be documented as required. The hopper and non-hopper vessels must be chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest. The exception is delimited further in that it is finite: The exception expires at the earlier of 30 years or when the vessel STUYVESANT ceases to be documented.

With respect to hopper vessels, the exception imposes the limitation that they be documented before the effective date of the Oceans Act--November 4, 1992.

With respect to non-hopper vessels, like the vessel MERIDIAN, Congress further delimited the exception to the 1992 amendment. The exception to non-hopper vessels only applies in two circumstances: The activities of the dredge must be deemed necessary to fulfill dredging obligations under a specific contract, including any extension periods; or, alternatively, the dredge must be serving in a temporary replacement capacity for a vessel that has become disabled. This alternative is delimited even further insofar as the replacement can run only for so long as the disability shall last and until the temporarily replaced vessel is in a position to fully resume dredging operations. This exception does not require that the vessels be documented as of November 4, 1992.

These provisions must be construed together and complement each other harmoniously. Under subsection (A)(i), the vessel STUYVESANT can perform dredging operations however chartered until, at a maximum, the end of its long-term charter (30 years). Under subsection (A)(ii), Stuyvesant Dredging Company or an entity in which it has an interest can charter a hopper, as long as it was documented before 1992, to engage in any dredging operation. These two provisions are directed to hopper vessels and contemplate future operations utilizing only hopper vessels that were in existence as of enactment. Under subsection (A)(iii), Stuyvesant Dredging Company or an entity in which it has an interest can utilize any non-hopper, even if not yet built, to fulfill contracts entered into utilizing STUYVESANT or any other qualified hopper. In other words, the non-hoppers would be supplemental to the dredging activities involving hoppers. Also, a non-hopper so chartered can be used as a temporary replacement for a hopper or a non-hopper. The latter event would occur when a contract is being performed only by a hopper or a non-hopper that has become disabled. Illustratively, (A)(iii)(b) would apply in the following scenario: Intervenor is engaged in a dredging operation involving a

hopper that becomes disabled. Section (A)(iii)(b) would prevent plaintiff from protesting intervenor's substitution of a non-hopper for the temporary replacement of the disabled hopper.

This is the only construction that gives effect to all of the conditions set forth in the exception to the 1992 amendment, interprets the phrases in context, and reads all of subsections (A)(i), (ii), and (iii) together, consonant with subsections (B), (C), and (D). While the wording of the statute cannot be characterized as uncomplicated, its meaning is both plain and clear.

Defendant argues that the vessel MERIDIAN, as chartered by Bean Stuyvesant, LLC, falls within subsection (A)(iii), per the plain meaning of the exception. As defendant reads that subsection, only four requirements must be met: (1) the vessel is a non-hopper dredge; (2) the vessel must be documented under chapter 121 of title 46; (3) the vessel must be chartered to Stuyvesant Dredging Company or to another entity in which it has an ownership interest to fulfill dredging obligations under a specific contract; and (4) the dredging would occur before either December 8, 2022, or the cessation of STUYVESANT'S documentation, whichever occurs first. Defendant sees only the third requirement is in question and argues that Stuyvesant Dredging Company's 50% interest in Bean Stuyvesant, LLC, satisfies subsection (A)(iii).

This reading, according to defendant, is not contrary to the legislative purpose; it is consistent with 46 U.S.C. app. § 802, which explicitly requires 75% U.S.-citizen ownership. Because Congress demonstrated in that provision that it knew how to draft specific numerical ownership requirements, the omission of any such requirement from subsection (A)(iii) exception to the 1992 amendment was intentional. This aspect of defendant's construction is not material. Plaintiff is not contending that the statute imposes any specific minimum ownership interest in the entity. The exception

does not support such a reading, in any event. What defendant insists, however, is that the language contemplates that the exception allows an entity formed after the date of enactment.

Defendant characterizes both subsections (A)(ii) and (iii) as "forward looking and [they] contemplate that vessels will in the future be chartered to either Stuyvesant Dredging Co. or to another entity in which it has an ownership interest." Def.'s Br. filed Oct. 9, 2003, at 3. Defendant makes much of the fact that the "only charter of a U.S. flagged vessel that Stuyvesant Dredging Co. possessed on November 4, 1992 (the Act's effective date) was its long-term charter of the dredge STUYVESANT."[12] *Id.* According to defendant, its position is supported by these facts in conjunction with 1 U.S.C. § 1 ("words in the present tense include the future as well as the present") and case law stating that "undeviating use of the present tense" equates to a cause of action for present or future harm, but not past harm. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987).

Therefore, defendant's proffered plain meaning is that Stuyvesant Dredging Company and any entity in which it has an interest may be eligible for awards of future contracts using non-hopper vessels or temporarily replace any vessel in the future, up to the time the vessel STUYVESANT is no longer in service, which is limited to 30 years.

Agreeing with plaintiff that all three subsections are directed to a vessel, defendant interprets all three subsections only insofar as acknowledging that each has a specific limitation. Defendant concedes that the operation of hopper vessels was the focus at the time the legislation is enacted. The court

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[12] The relevant legislative history, as discussed below, does not indicate the number of charters possessed by Stuyvesant Dredging Company at the time of enactment. *See infra* note 17.

cannot interpret an exception to a statute that prohibits charters by foreign-owned entities to permit foreign-owned entities to charter not yet documented non-hopper vessels to perform future contracts not involving hopper vessels, unless the non-hoppers provide temporary replacements for disabled hoppers or non-hoppers. Such a reading is not consistent with subsections (A)(i) and (A)(ii), which limit the exception to the vessel STUYVESANT and an existing fleet of other hoppers, *i.e.*, the exception cannot swallow the rule.

Intervenor's argument based on plain meaning parallels that of defendant. Intervenor focuses on the language of the subsection (A)(iii) exception to show that Stuyvesant Dredging Company's 50% ownership interest in intervenor satisfies its requirements. The vessel MERIDIAN is a non-hopper dredge in which Stuyvesant Dredging Company has an ownership interest and the MERIDIAN "will be chartered to Bean Stuyvesant for the length of time needed to complete the contract awarded under Solicitation DACW54-03-B-0011 including any extensions." Intv.'s Br. filed Oct. 3, 2003, at 7. Intervenor notes that subsection (A)(iii), unlike subsection (A)(ii), does not limit non-hopper vessels to those documented as of November 4, 1992. Consequently, intervenor reasons, the plain meaning of the non-hopper exception is that future contracts and activities with later-documented non-hopper vessels are contemplated.

Tellingly, intervenor expresses the subsection (A)(iii) exemption as giving Stuyvesant Dredging Company "a means of operating within the United States." Transcript of Proceedings, *Norfolk Dredging Co. v. United States*, No. 03-2225C, at 51 (Fed.Cl. Oct. 14, 2003) (oral argument) ("Tr."). According to intervenor, subsection (A)(iii) is a limitation on contracts, not on a specific type of vessel. Intervenor interrelates the three subsections insofar as subsection (A)(i) allows STUYVESANT free reign for the 30-year remainder of its charter and other hoppers chartered to Stuyvesant Dredging Company or an entity in which it has an interest for the same

term, as long as these hoppers were documented at the beginning of the period. This activity is not tied to any contract; indeed, these hoppers can "[s]ail ... up and down the Delaware for pleasure cruises." Tr. at 76. Subsection (A)(iii), in contrast, focuses on the contracts on which Stuyvesant Dredging Company and the entity can bid. Thus, intervenor reads the three provisions as separate limitations and does ground subsection (A)(ii) on a vessel.

Each of the three subsections is tied to operations of the vessel STUYVESANT. Defendant and intervenor each urge a plain-meaning construction that ignores the interrelationship of the exception for non-hopper vessels and the provisions for hopper vessels. In doing so, they ignore the canon of statutory interpretation that, if possible, each word in the statute must be given effect. *Chickasaw Nation*, 534 U.S. at 94, 122 S.Ct. 528; *see also Gwaltney*, 484 U.S. at 68, 108 S.Ct. 376 (Scalia, J., dissenting because Court "ignore[d] the words of the statute").[13] "We have stated time and again that

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[13] The court agrees with defendant and intervenor that the exception allows Stuyvesant Dredging Company or any entity in which it has an interest to enter into future contracts with its existing fleet. Interestingly, defendant cites to the majority opinion in *Gwaltney* to make its case that the statute contemplates allowing Stuyvesant Dredging Company to expand its interests in the future. The majority stated that the language and structure of the other provisions in the act, together with the "to be in violation" language, entailed a forward-looking construction. *Gwaltney*, 484 U.S. at 59, 108 S.Ct. 376. In the present case, reading all the provisions together entails a construction with temporal restrictions. Subsection (a)(i) is restricted temporally to the existence of the STUYVESANT; (a)(ii), to any other hopper documented before November 4, 1992; and (a)(iii), to a non-hopper as "is necessary ... to fulfill dredging obligations under a specific contract, including any extension periods" or as a temporary replacement. As the first two subsections are located temporally in the present, the most logical and natural construction places the third subsection temporally in the present, as well. Moreover, this reading is consonant

courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)).

The plain meaning construction is valid whether or not Stuyvesant Dredging Company had any non-hopper dredging vessels chartered to itself or to an entity in which it had an ownership interest as of the date of enactment. Defendant is correct in that the exception to the 1992 amendment would allow Stuyvesant Dredging Company to join in future entities, and charter through them. Defendant, however, fails to acknowledge that any such entities still are restricted by (A)(iii)(a) and (b), insofar as they may charter non-hopper vessels. An arrangement would satisfy this part of the exception only if the chartered non-hopper vessel "is necessary ... to fulfill dredging obligations under a specific contract," supplementing a hopper vessel documented as of 1992, "including any extension periods," or to complete temporary replacement of a hopper or non-hopper performing a hopper contract. Neither defendant nor intervenor has argued that Bean Stuyvesant, LLC, is chartering the MERIDIAN to fulfill a specific contract in existence, including any extension period, at the time of the enactment.

"The statute is clear on its face, however, as the court ably explains, and thus anything one Senator, or even several Senators, may have said with regard to the statute cannot vary its meaning; it is the statute that is the law, not some selected piece of the legislative record." *Alliant Techsystems,*

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with sections (B)-(D) of the exception to the 1992 amendment. Section (B) limits the exemption to certain activities of the vessel COLUMBUS, and both (C) and (D) are temporally restricted to vessels owned and/or chartered by a corporation with certain documentation in place as of August 1, 1989.

Inc. v. United States, 178 F.3d 1260, 1277 (Fed.Cir.1999) (Plager, J., concurring). The court should not consult legislative history to bolster its result. In fact, the Supreme Court repeatedly has instructed courts not to so. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, __, 123 S.Ct. 2148, 2153, 156 L.Ed.2d 84 (2003) (stating that with unambiguous statute the judicial inquiry is complete); *cf. Bath Iron Works, Corp. v. United States*, 20 F.3d 1567, 1581-82 (Fed.Cir.1994) (reviewing legislative history where Government argued that it revealed ultimate purpose of act); *Richards Med. Co. v. United States*, 910 F.2d 828, 830 (Fed.Cir.1990) (beginning with plain meaning and then consulting other extrinsic aids, including legislative history, as necessary). As the parties agree that the plain meaning of the statute can be ascertained and controls, legislative history is relevant only if 1) the plain-meaning construction is inconsistent with the stated purpose of the statute, as articulated by Congress, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), or 2) if the construction would produce an absurd result, *Commissioner v. Brown*, 380 U.S. at 571-72, 85 S.Ct. 1162; *see also Reid v. Dep't of Commerce*, 793 F.2d 277, 281-82 (Fed.Cir.1986) (citing cases).

The legislative history is limited.[14] The full language of the exception to the 1992 amendment inspired some pertinent discourse in the House of Representatives. See 138 Cong. Rec. 15647 (1992). Representative W.J. ("Billy") Tauzin noted that the amendment as a whole arose because "dredges [were] not subject to the same requirement as other aspects of

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[14] Defendant indicates that part of the legislative history refers to a prior version of the exception when it exempted only "the vessel STUYVESANT, official number 648540, operating under an Order of Approval granted under section 9 of the Shipping Act, 1916 (46 App. U.S.C. 808)." H.R. Rep. 102-260, at 4 (1991). The court refers only to the legislative history citing the exception language as adopted.

the maritime industry," stating its purpose as "clos[ing] loopholes" in the law. *Id.* (statement of Rep. Tauzin). The amendment "has been written in cooperation with the U.S. dredging operators and grandfathers *existing* foreign-owned fleets." *Id.* (emphasis added).[15] The October 5, 1992 House Congressional Record provides a section-by-section analysis of the Coast Guard Authorization Act, which was preceded by citation in full of the exception in question as adopted.[16] That analysis recites that "[s]ubsection (a)(2) of the bill grandfathers certain *existing* vessels that do not currently comply with these new requirements and vessels that are used as an integral part of an operation where dredging is a minority of the total costs of that operation."[17] 138 Cong. Rec. 32471 (1992) (emphasis added).

Plaintiff asserts that the reference to existing fleets and vessels demonstrates congressional intent to "preserve the status quo" for Stuyvesant Dredging Company and not to

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[15] Defendant observes that Representative Tauzin did not state directly that the purpose of the exception was "protect[ing] existing dredging operations." That statement was part of a position paper issued by the House Committee on Merchant Marine and Fisheries, which Representative Tauzin directed to be incorporated into the Congressional Record. *See* 138 Cong. Rec. 15647 (1992). Moreover, in October 1991 this position statement appeared in the same form in House Report 102- 260, accompanying bill H.R. 1464, in which the Stuyvesant exception extended to the vessel only, and not to any hoppers or non-hoppers. *See* H.R.Rep. No. 102-260, at 4 (1991).

[16] The exact language corresponds to the session law. *See* Pub.L. No. 102-587, 106 Stat. 5084.

[17] Despite following a statement of the exception as adopted, the (a)(2) reference most likely refers back to the earlier version of the exception referring to the vessel only, as the numbering corresponds best to "Sec. 7. Coastwise Law," "(a) DREDGES," "(2) EXCEPTION," in H.R. 1464. *See* H.R.Rep. No. 102-260, at 4.

provide its foreign owner with an opportunity to expand its dredging operations. Pl.'s Br. filed Oct. 6, 2003, at 23. Moreover, plaintiff views this exception as a means for Congress to allow the STUYVESANT, one of the largest hopper dredges in the fleet at the time, to continue its operations for a limited period. Defendant counters that this legislative history is, at best, ambiguous. Defendant concedes that it could refer only to "dredging contracts then in progress," but proffers that Congress could have intended to assure the "continued economic success of Stuyvesant Dredging Co. in the U.S. dredging market." Def.'s Br. filed Oct. 3, 2003, at 16. Intervenor admonishes that plaintiff's reading of the legislative history would render superfluous the language "or to an entity in which it has an ownership interest." Intv.'s Br. filed Oct. 8, 2003, at 14. Intervenor concurs with defendant that no evidence is present of a clear congressional intent that would support plaintiff's position and reiterates the congressional purpose to permit Stuyvesant Dredging Company to operate in the United States.[18]

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[18] The parties have cited to a background document drafted in anticipation of the "Joint Hearing on Interpretations of Existing Ownership Requirements for U.S. Flag Dredges of the Subcommittee on Water Resources and Environment and the Subcommittee on Coast Guard and Maritime Transportation," which subsequently was held on April 30, 2003. *Available at* http://www.house.gov/transportation/water/04-30-03/04-30-03memo.html. Defendant also includes statements by individuals who testified at the April 30, 2003 hearing, including: Larry Burton, Director of the International Trade Compliance Division, Office of Regulations and Rulings, Bureau of Customs and Border Protection; Barry W. Holliday, Chief, Navigation and Operations Branch of the Corps; James W. Bean, Chairman and CEO of C.F. Bean, LLC; and Richard S. Weeks, President of the Dredging Contractors of America. *Available at* http://www.house.gov/transportation/water/04-30-03/04-30-03memo.html# WITNESSES. Given the expedited nature of this

This court reads legislative history with the appropriate caution dictated by the Supreme Court. Nothing in the lim-

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case, the court has relied on the parties to show why the supplemented materials cited in their briefs should be regarded either as legislative history of the 1992 Oceans Act or manifestation of Congress's view of the legislation post-enactment. These materials are not considered by this court because they are not part of the legislative history of 46 U.S.C. app. § 292 and do not indicate how the House of Representatives interprets the terms.

The document, which describes the background of the statute in issue, and the witnesses' statements are not appropriate for judicial notice. Fed.R.Evid. 201. The background document and statements do not relate to legislation that has been passed by Congress. Congressional hearings regarding the statute were held in 1996, with no new legislation resulting. *See* 142 Cong. Rec. S. 5589 (1996). Plaintiff observes that Congress rejected legislation that would have permitted foreign-registered vessels to dredge in U.S. waters in 1996 and thus argues that no significance should be given to this preliminary legislative skirmishing in 2003.

Intervenor's affiant, Robert Dugas, an accountant, states that in 1992 Stuyvesant Dredging Company did not have an interest in another entity that chartered dredging vessels. Language in the background document is to the same effect. The court has been cited no authority that recognizes either an affidavit generated for litigation in 2003 or a background document created for a hearing conducted in 2003 as legislative history for an act of 1992, or evidence of Congress's approval of Customs' interpretation by virtue of utilizing the same language in new legislation.

The 2003 events on Capitol Hill concern another bill that may or may not be enacted. The parties' synopses of the hearing on April 30, 2003 (no verbatim transcript is available, and the court declines plaintiff's offer to view a videotape), depict a maelstrom. Locked in the positions that they have been advocating for over a decade (plaintiff's faction decrying the exception as forbidding the creation of any new entities and intervenor's faction extolling its U.S.-citizen ownership), the parties prove that neither is satisfied with the statutory language, as written. This contretemps does not mean, however, that the statute lacks a plain meaning.

ited legislative history indicates a clear congressional purpose in contradiction to the plain meaning construction of the statute set forth above. Congress was "clos[ing] loopholes" and thereby limited the exceptions for STUYVESANT and/or Stuyvesant Dredging Company in each subsection of 5501(a)(2)(A). As defendant points out, the statement that the "amendment also includes a grandfather clause to protect existing dredging operations" corresponds most directly to the earlier version of the exception. However, the amendment as finally enacted with the current amended language, first was presented to the House of Representatives. After reading the language in question, Representative Tauzin stated: "This amendment would close loopholes in the Federal law. It has been written in cooperation with the U.S. dredging operators and grandfathers existing foreign-owned fleets." 138 Cong. Rec. 15647.

An intent to grandfather in "existing vessels" and "protect existing dredging operations" is not ambiguous, as defendant argues, or inconsistent with the construction adopted. Congress consistently sought to confine foreign dredging operations. In the first instance, the legislation confined the operations to the vessel STUYVESANT only. Subsequently, Stuyvesant Dredging Company's activities were limited to hoppers documented before November 4, 1992, and to non-hoppers that would fulfill obligations under contracts (or their extensions) performed by hoppers documented prior to 1992 or as temporary replacement vessels for hoppers or non-hoppers performing hopper contracts.

Whether C.F. Bean, LLC, intends to develop more ventures with Stuyvesant Dredging Company or Stuyvesant with other entities is irrelevant; and no evidence has been placed into the record as to its intentions. *See supra* note 18. The court, however, cannot construe the exception in a way that could enable the limitation to swallow the amendment. If defendant's and intervenor's plain meaning were accepted, and it would not be plain, the result would be that foreign entities

could charter non-hoppers not yet documented for any dredging for the next 30 years. The exception would disappear because it would allow for unlimited expansion by Stuyvesant Dredging Company into the non-hopper dredging business. "Strict adherence to the language and structure of [an] Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n. 14, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989).

5. *Injunctive relief*

To obtain permanent injunctive relief, plaintiff must also show: (1) that it will be immediately and irreparably injured; (2) that the public interest would be better served by the relief requested; and (3) that the balance of hardship on all the parties favors the protestor. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed.Cir.1983); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (standard for permanent injunction is essentially same as temporary injunctions, except actual success replaces need to show likelihood of success on merits).

An action at law only allows recovery of "bid preparation costs in a suit for damages, but not loss of anticipated profits," leaving a bid protestor irreparably harmed. *Essex Electro Eng'rs, Inc. v. United States*, 3 Cl.Ct. 277, 287 (1983), *aff'd*, 757 F.2d 247 (Fed.Cir.1985); *see also Keco Indus., Inc. v. United States*, 203 Ct.Cl. 566, 575 n. 5, 492 F.2d 1200, 1204 n. 5 (1974) (acknowledging existence of a damages remedy sometimes reason for denial of injunctive relief in federal district court); *Steinthal & Co., Inc. v. Seamans*, 455 F.2d 1289, 1302 (D.C.Cir.1971) (holding that availability of damages, which do not include lost profits, does not warrant automatic dismissal of injunction regardless of strength of claim on merits).

Defendant cites precedent for the proposition that lost profits are speculative and cannot constitute irreparable harm. In *Superior Services, Inc. v. Dalton*, 851 F.Supp. 381, 387 (S.D.Ca.1994), the district court held that "plaintiffs' best argument [for irreparable harm] is that they likely would not recover lost profits if it was determined the contract was erroneously awarded." Ultimately denying plaintiff's injunction, the district court did not find that lost profits were themselves to be speculative; rather, it was speculative to assume that plaintiffs would have been awarded the contract. *Id.* (noting that plaintiff ranked second for technical ability, but seventh for cost); *see also OAO Corp. v. United States*, 49 Fed.Cl. 478, 481 (2001) (finding slight evidence of irreparable harm, but denying injunction where likelihood of success on the merits is also minimal); *cf. United Int'l Investigative Servs., Inc. v. United States*, 42 Fed.Cl. 73, 75-76 (1998), aff'd, 194 F.3d 1335 (1999) (unpubl.) (denying temporary injunction for plaintiff when not deprived of opportunity to compete for award); *Minor Metals, Inc. v. United States*, 38 Fed.Cl. 379, 382 (1997) (court initially granted temporary injunction for plaintiff, withdrawn by agreement of parties, and denied subsequent injunction because plaintiff was not precluded from taking part in bidding process).

Not only are these cases distinguishable, but the proposition itself is suspect. If lost profits do not constitute irreparable harm, then protesters who are seeking to displace a putative awardee automatically fail to meet one of the four requirements for injunctive relief. The usual rule is that mere loss of money does not qualify as irreparable harm if the party can be made whole through money damages when the claim, which does not itself seek an injunction, is resolved on the merits. In those bid protests, involving contract awards--not resolicitation or cancellation or another form of relief--a protester is limited to recovery of bid preparation costs if it fails to obtain injunctive relief. Loss of anticipated profits thus can be remedied solely by injunctive relief. The pro-

tester's interests cannot be met with a suitable monetary award in these circumstances unless a permanent injunction is granted.

Plaintiff has succeeded on the merits, establishing that the Corps violated an applicable procurement regulation by considering intervenor as qualified. The public interest is served by ensuring a procurement process conforms to applicable procurement regulations. *See Essex Electro*, 3 Cl.Ct. at 288. In comparing the hardships of an injunction, intervenor is not harmed by aborting a flawed award process.

Although the Corps's interest in timely performance of the contract is mitigated by agreement of the parties, prior to this court's decision, to terminate intervenor's contract if this court finds intervenor ineligible, defendant points out that contract performance may be disrupted if the contract must be awarded to a new contractor. Intervenor's performance will be funded via a continuing appropriation, but the pending request for appropriation must be enacted before the Corps can award a new contract. Defendant asserts:

> Norfolk is potentially eligible for award of the contract in the event that Bean Stuyvesant LLC is determined not to be eligible and if funding is available in a timely manner.... Moreover, because an award to Norfolk would not be a "continuing contract," the Corps would be required to obligate the entire amount of the contract upon award. The Corps will not have the funds to do this until passage of its FY 2004 appropriations bill. Because the performance period for this work is limited to November 1, 2003 to April 30, 2004, the project may be in jeopardy if Bean Stuyvesant LLC is determined not to be eligible and passage of the FY 2004 appropriations bill is significantly delayed.

Def.'s Counter-Statement of Facts, No. 31 filed Oct. 9, 2003. The court accepts this distinction, although defendant did not

argue in either of its briefs that a permanent injunction would jeopardize contract performance. As the record stands, no legal argument has been made by any party on this subject. The court recognizes the possibility that the appropriation may not pass in time, as well as the possibility that it could pass in a timely manner. Defendant has not shown that the public interest will not be served by preventing intervenor to continue at this time, and plaintiff has shown that the public interest would be served by implementing Congress's expressed intent in 1992 to "grandfather existing foreign-owned fleets."

Taking all the facts into consideration, plaintiff has established its entitlement to injunctive relief.

CONCLUSION

Based on the foregoing, plaintiff's cross-motion for summary judgment is granted, and defendant's and intervenor's are denied. Accordingly:

1. Defendant, by and through the U.S. Army Corps of Engineers, its officers, agents, and employees, is permanently enjoined from proceeding with performance of the contract on Solicitation No. DACW54-03-B-0011 with any entity other than Norfolk Dredging Co., provided that the Corps of Engineers finds Norfolk Dredging Co. to be a responsible contractor.

2. Paragraph 10 of the Agreement Pertaining To Morehead City Harbor Dredging Cont[r]act Solicitation DACW54-03-B-0011 signed by all parties and made Ex. A to the Transcript of Proceedings in *Norfolk Dredging Co., Inc. v. United States*, No. 03-2225C (Fed.Cl. Sept. 30, 2003), is fully incorporated in this order:

> In the event the decision of the Court of Federal Claims is that Bean Stuyvesant is not eligible for award of the contract, the Government will termi-

> nate the contract awarded to Bean Stuyvesant under the terms of the clause entitled "Termination for the Convenience of the Government," and the Government and Bean Stuyvesant agree that this would be a no-cost termination.

3. By December 5, 2003, defendant shall file a Status Report reporting on the termination of intervenor's contract and stating the status of or result of any determination of plaintiff's responsibility.

4. Counsel for defendant shall communicate by no later than 6:00 p.m. on October 14, 2003, the contents of this order to the contracting officials of the U.S. Army Corps of Engineers and shall deliver to them a copy of this opinion and order as soon as practicable.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing in banc having been filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED, that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing in banc be, and the same hereby is, DENIED

FOR THE COURT,

/s/ Jan Horbaly

Jan Horbaly
Clerk

Dated: August 13, 2004

cc: Domenique Kirchner, Heather Spring
Michael H. Payne
John Longstreth

NORFOLK DREDGING V US, 04-5040, -5041
(CFC – 03-CV-2225)

46 U.S.C. App. § 292

§ 292. Vessels that may engage in dredging

(a) In general

Except as provided in subsection (b) of this section, a vessel may engage in dredging in the navigable waters of the United States only if--

(1) the vessel meets the requirements of section 883 of this title and sections 802 and 803 of this title for engaging in the coastwise trade;
(2) when chartered, the charterer of the vessel is a citizen of the United States under sections 802 and 803 of this title for engaging in the coastwise trade; and
(3) for a vessel that is at least 5 net tons, the vessel is documented under chapter 121 of Title 46 with a coastwise endorsement.

(b) Exception

A documented vessel with a registry endorsement may engage in the dredging of gold in Alaska.

(c) Penalty

When a vessel is operated in knowing violation of this section, that vessel and its equipment are liable to seizure by and forfeiture to the United States Government.

46 U.S.C. App. § 292 note

(2) The amendment made [by paragraph (1) of Pub. L. No. 102-587 § 5501(a)(2)] does not apply to--

(A)(i) the vessel STUYVESANT, official number 648540;

(ii) any other hopper dredging vessel documented under chapter 121 of title 46, United States Code [section 12101 et seq. of Title 46, Shipping] before the effective date of this Act [probably means Nov. 4, 1992] and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest; however, this exception expires on December 3, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121 [section 12101 et seq. of Title 46], whichever first occurs; and

(iii) any other non-hopper dredging vessel documented under chapter 121 [section 12101 et seq. of Title 46] and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest, as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121 [section 12101 et seq. of Title 46], whichever first occurs;

(B) the vessel COLUMBUS, official number 590658, except that the vessel's certificate of documentation shall be endorsed to prohibit the vessel from engaging in the transportation of merchandise (except valueless material), including dredge material of value, between places within the navigable waters of the United States;

(C) a vessel that is engaged in dredged material excavation if that excavation is not more than a minority of the total cost of the construction contract in which the excavation is a single, integral part, and the vessel is--

(i) built in the United States;
(ii) a non-self-propelled mechanical clamshell dredging vessel; and
(iii) owned or chartered by a corporation that had on file with the Secretary of Transportation, on August 1, 1989, the certificate specified in section 27A of the Merchant Marine Act, 1920 (46 App. U.S.C. 883-1) [section 883-1 of this title]; or

(D) any other documented vessel engaged in dredging and time chartered to an entity that, on August 1, 1989, was, and has continuously remained, the parent of a corporation that had on file with the Secretary of Transportation on August 1, 1989, a certificate specified in section 27A of the Merchant Marine Act, 1920 (46 App. U.S.C. 883-1) [section 883-1 of this title] if the vessel is--

(i) not engaged in a federally funded navigation dredging project; and
(ii) engaged only in dredging associated with, and integral to, accomplishment of that parent's regular business requirements.

46 U.S.C. App. § 802

§ 802. Corporation, partnership, or association as citizen

(a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not

vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.